Supreme Court, U.S.
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No. 95-260

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

AIU INSURANCE CO., *et al.*,

Petitioners,

v.

W. R. GRACE AND COMPANY-CONN., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that the deferential "clearly erroneous" standard of review is applicable to a district court's determination that a contract was formed between the parties.

2. Whether a district court's determination of a mixed question of law and fact is subject to de novo review on appeal.

PARTIES INVOLVED

Petitioners are: AIU Insurance Co.; American Home Assurance Company; Birmingham Fire Insurance Company of Pennsylvania; Granite State Insurance Company; National Union Fire Insurance Company of Pittsburgh, Pa.; New Hampshire Insurance Company; The Insurance Company of the State of Pennsylvania; and Lexington Insurance Company.[1] Respondents are: W.R. Grace & Co.-Conn.;[2] Dayton Independent School District; Aldine Independent School District; Albany Independent School District; Banquete Independent School District; Bastrop Independent School District; Brazosport Independent School District; Brownfield Independent School District; Calhoun County Independent School District; Canyon Independent School District; Clear Creek Independent School District; Columbia-Brazoria Independent School District; Deer Park Independent School District; East Chambers County Independent School District; Ector County Independent School District; Edgewood Independent School District; Gainesville Independent School District; Galena Park Independent School District; Houston Independent School District; Hurst-Euless-Bedford Independent School District; Irving Inde-

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[1] Petitioners' ultimate parent corporation is American International Group, Inc. Petitioners have the following non-wholly owned subsidiaries and affiliates: Transatlantic Holdings, Inc.; Asesores Bursatiles Venture Fund N.V.; Aeronautical Support, Inc.; Pacific Asia Leasing; Developpement et Finance; Hoeri Corp.; Pacific Ocean Leasing, Inc.; Asesores Bursatiles Capital Fund N.V.; JI Accident & Fire Insurance Co., Ltd.; 20th Century Industries.

[2] Petitioners are informed and believe that respondent W.R. Grace & Co.-Conn. has the following parent corporations and non-wholly owned subsidiaries: W.R. Grace & Co.; Amicon, Inc.; Grace Construction Products; Grace Dearborn; Grace Packaging; Polyfibron Corp.

pendent School District; Jourdanton Independent School District; Killeen Independent School District; La Feria Independent School District; La Grange Independent School District; Los Fresnos Independent School District; Meadow Independent School District; Mesquite Independent School District; Midland Independent School District; North Forest Independent School District; Odem-Edroy Independent School District; Pasadena Independent School District; Port Arthur Independent School District; San Benito Independent School District; Schertz-Cibolo-Universal Independent School District; Snyder Independent School District; Spring Hill Independent School District; Texarkana Independent School District; Waelder Independent School District; West Rusk Independent School District; Alamo Community College District; Houston Community College District; Lee College District; San Jacinto College District; South Plains Junior College; Tyler Junior College; Wharton County Junior College; the County of Orange, State of Texas; the County of Galveston, State of Texas; the County of Harris, State of Texas; Harris County Hospital District; Harris County Flood Control District; the City of Houston; the City of Dallas; the City of Fort Worth; the City of Austin; Dallas-Fort Worth International Airport; McLennan Community College; Texas Southmost Junior College; Port Neches Independent School District; Claude Independent School District; Coldspring-Oakhurst Independent School District; and Groom Independent School District.

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AIU INSURANCE CO., ET AL.,
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W.R. GRACE AND COMPANY-CONN., ET AL.,
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners AIU Insurance Company, et al., respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The court of appeals' April 12, 1995, *per curiam* decision affirming the judgment of the district court is reproduced at Appendix ("App.") A, *infra*, 1a-5a, and is not reported. The district court's January 14, 1994, Findings of Fact and Conclusions of Law is reproduced at App. B, *infra*, 6a-30a, and is not reported.

JURISDICTION

The jurisdiction of the district court was founded upon 28 U.S.C. §§ 1332 and 1367. The jurisdiction of the court of appeals was founded upon 28 U.S.C. § 1291 and Fed. R. Civ. P. 54(b). The judgment of the court of appeals was entered on April 12, 1995. A timely petition for rehearing was denied on May 18, 1995. App. C, *infra*, 31a-32a. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Factual Background

Petitioners are an affiliated group of insurance companies. From the 1950s through the 1970s, respondent W.R. Grace and Company ("Grace") manufactured and installed asbestos fire-proofing in buildings throughout the country. Between 1965 and 1984, petitioners issued Grace a number of excess liability policies with combined coverage limits of more than $500 million. App., *infra*, 7a-8a; C.A. App., tab 25. Grace was subsequently sued in several jurisdictions for property damage and personal injuries allegedly caused by its asbestos products. The present case grew out of one of those suits.

This litigation began in 1981 when several Texas school districts filed a diversity action in the United States District Court for the Eastern District of Texas alleging various asbestos-related claims against numerous defendants. In 1987, the district court severed a number of these claims. The severed claims became the subject matter of this action, *Dayton Independent School District, et al. v. U.S. Mineral Products Company, et al.*, No. B-87-00507-CA (E.D. Tex.) ("*Dayton II*"). In May 1988, additional parties (respondents herein) intervened as plaintiffs in *Dayton II* and filed claims against additional defendants, including

Grace, arising out of the installation of asbestos-containing products in public buildings.

On November 26, 1991, Grace filed a third-party complaint in the *Dayton II* action against its excess insurance carriers, including petitioners, seeking insurance coverage for the claims asserted by the plaintiffs in *Dayton II*. App., *infra*, 8a. In addition, Grace had also filed insurance coverage actions against petitioners in several other state and federal forums, including courts in New York, California, Minnesota, Mississippi and Texas. These claims arose from various suits against Grace seeking damages allegedly caused by Grace's asbestos products.

In May 1992, certain petitioners and Grace initiated settlement discussions in an effort to achieve a global resolution of all of their various insurance coverage disputes. In November 1992, the parties reached a proposed agreement in principle that provided, *inter alia*, that these petitioners and another insurance company would pay a specified portion of Grace's defense costs and adverse damage awards with respect to all asbestos-related claims asserted against Grace nationwide, up to a total of $380 million in indemnity and expense payments.[3] *Id.* at 10a. In exchange, Grace would, *inter alia*, relinquish all claims against petitioners and seek dismissal of all of its pending lawsuits against petitioners. App., *infra*, 9a-10a.

The parties commenced exchanging proposed draft settlement agreements in January 1993, and continued to work towards developing mutually acceptable terms. App.,

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[3] This proposed total was subsequently increased to $419 million when two additional insurance carriers, petitioners Lexington Insurance Company and Birmingham Fire Insurance Company, decided to consider participating in the proposed settlement agreement. App., *infra*, 10a.

infra, 12a-13a. The draft of April 23, 1993, which was the last proposed draft exchanged between the parties, included provisions addressing some, but not all, of the remaining issues between the parties. *Id.* at 13a-14a. This draft agreement expressly provided that "[t]his Agreement shall become effective (the 'Effective Date') as to each party from and after the date the last party shall have executed this Agreement." C.A. App., tab 23, at 25. Neither this draft, nor any other document constituting a settlement agreement, was ever executed by the parties. App., *infra*, 14a.

On June 11, 1993, petitioners paid Grace $15.3 million pursuant to "an agreement in principle." App., *infra*, 14a. After receiving this payment, Grace asked when it might receive the executed version of the draft settlement agreement. Petitioners replied that not all of the required signatures had been obtained. *Id.*

On August 30, 1993, petitioners made a second payment of $15.3 million to Grace. Petitioners' letter of transmittal indicated that this payment was being made pursuant to the "agreement in principle," App., *infra*, 14a, but petitioners again withheld execution and final approval of the settlement agreement. Shortly thereafter, Grace informed petitioners that it would not dismiss its various coverage claims against petitioners unless and until petitioners executed the proposed settlement agreement. *Id.* at 16a.

In September 1993, the United States Court of Appeals for the Second Circuit decided *Maryland Casualty Co. v. W.R. Grace & Co.-Conn., et al.*, No. 91-9322 (Sept. 1, 1993), *amended on reh'g*, 23 F.3d 617 (2d Cir.), *cert. denied*, 115 S. Ct. 655 (1994), which made clear that petitioners' potential exposure under the policies issued to Grace was approximately $60 million, far less than the maximum amount set forth in the draft settlement agreement. Because the draft agreement had not been finalized

or executed, petitioners rejected the proposed agreement and informed Grace that further negotiations would be needed to incorporate the effects of the *Maryland Casualty* decision into any agreement. App., *infra*, 16a.

B. District Court Proceedings

Despite the parties' failure to execute any agreement, on October 14, 1993, Grace asked the Texas district court in *Dayton II* to enforce the purported settlement agreement between petitioners and Grace. App., *infra*, 7a. Petitioners challenged the motion to enforce on the ground that the parties never reached a settlement agreement. This argument was based in part on New York Civil Practice Law and Rule ("CPLR") 2104, which requires that out-of-court agreements between litigants be reduced to a signed writing in order to be enforceable.[4]

In its January 14, 1994, Findings of Fact and Conclusions of Law, the district court held that an enforceable settlement agreement had been formed between the parties under New York law. The court conceded that the parties never entered into a written agreement and that the draft agreement explicitly stated: "'this Agreement shall become effective . . . after the date the last party shall have executed this Agreement.'" App., *infra*, 22a. Nonetheless, the court held that this language did not constitute an "express precondition to the formation of the

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[4] CPLR 2104 provides: "An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered." There is no dispute that New York law, including CPLR 2104, governs the question whether a binding settlement agreement was formed between the parties in this case.

contract," but was instead merely an indication of "the timing of various acts that were to occur." *Id.* at 23a.

The court further held that petitioners' partial payments of Grace's claims constituted evidence of petitioners' intent to be bound by the draft agreement, and that the draft agreement embodied all the essential terms of the proposed settlement. App., *infra*, 23a-24a. Finally, while conceding that an agreement of this complexity and financial magnitude would normally be reduced to writing, the court held that "'the mere fact that the parties contemplate memorializing their agreement in a formal document does not prevent their informal agreement from taking effect prior to that event.'" *Id.* at 24a.

The court also ruled that New York's CPLR 2104, which prohibits enforcement of an unsigned and unwritten settlement agreement, did not bar enforcement of the alleged oral agreement. App., *infra*, 27a-29a. First, the court ruled that the requirements of CPLR 2104 could be satisfied by "substantial compliance," and concluded that the unexecuted draft agreement satisfied this legal standard. *Id.* at 27a-28a.

Second, the court held that oral out-of-court settlements may be enforced if equitable considerations counsel application of estoppel principles. Concluding that Grace had detrimentally relied on the agreement, the court held that petitioners were estopped from invoking the protections of CPLR 2104. App., *infra*, 28a. Finally, the court ruled that oral settlements may be enforced if the agreement is partially performed, and concluded that the actions of the parties in this case constituted partial performance within the meaning of New York law. *Id.* at 28a-29a.[5]

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[5] The court also rejected petitioners' arguments that two other New York statutes barred enforcement of the alleged

Accordingly, the court entered judgment awarding Grace $13.2 million in damages for petitioners' repudiation of the alleged settlement agreement. App. D, *infra*, 34a-37a.

C. The Court of Appeals' Opinion

Petitioners appealed to the United States Court of Appeals for the Fifth Circuit. Petitioners contended, *inter alia*, that the trial court erred in holding that an enforceable settlement agreement had been formed. Specifically, petitioners contended that the district court misapplied New York law in several aspects of its analysis: (1) the court misconstrued provisions in the draft agreement that conditioned the settlement upon execution of a written instrument; (2) the court misapplied New York contract law by according insufficient legal weight to the parties' expressed intent not to be bound without a signed agreement; and (3) the court misinterpreted and misapplied three New York statutes that prohibited enforcement of the alleged oral agreement in this case. Pet. C.A. Br. 21-40. Petitioners argued that the district court's application of New York law to the facts of the case, like all mixed questions of law and fact, was reviewable de novo by the court of appeals. *Id.* at 21.

On April 12, 1995, the court of appeals issued a *per curiam* opinion affirming the district court's judgment. App. A, *infra*, 1a-5a. Although petitioner's appeal primarily challenged the district court's determinations of pure questions of law and its application of law to fact,

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settlement agreement. First, the court dismissed the contention that the agreement was unenforceable under New York General Obligations Law § 15-501 because it was an oral executory accord. App., *infra*, 25a-26a. Second, the court held that the agreement did not violate the New York Statute of Frauds, § 5-701(a)(1). App., *infra*, 26a-27a.

including in particular the mixed question whether a settlement agreement had been formed, the court of appeals concluded that the issue of the validity of the alleged settlement agreement "ultimately is a fact question, and our inquiry is whether the district court was clearly erroneous in its finding." *Id.* at 3a.

The court of appeals conceded that "[t]he parties unquestionably all intended that the Settlement Agreement find expression in a formal instrument and, of course, that did not occur." App., *infra*, 3a. Nonetheless, the court held that the intent to reduce the settlement to writing was not determinative of whether the parties had reached a binding oral agreement. *Id.* The court found it significant that the payments made to Grace accorded with the terms of the draft agreement, and characterized these payments as giving rise to an inference that the parties had formed an agreement. *Id.* at 3a-4a.

Although the court noted that troubling consequences might follow from inferring a contract from mere negotiations, the court stated that "those risks are allocated by the contract law of New York." App., *infra*, 4a. The court did not indicate, however, that it was conducting any independent review of the district court's legal conclusions or of its application of the governing legal standards to the largely undisputed facts of the case. Indeed, the panel made no reference whatsoever to New York CPLR 2104, the statute rendering settlement agreements unenforceable unless reduced to writing. Instead, the court concluded that, while the validity of the settlement agreement "presents a close issue of fact," the "findings of the district court were not clearly erroneous." *Id.* at 5a.

REASONS FOR GRANTING THE WRIT

The Court Of Appeals' Holding That Issues Of Contract Formation Are Subject To Clear Error Review Conflicts With Decisions Of The Eighth, Eleventh, And Federal Circuits And Contradicts The Prevailing Approach To Review Of Mixed Questions Of Law And Fact

The court of appeals incorrectly applied a "clearly erroneous" standard of review to the district court's determination that an enforceable settlement agreement had been formed. That approach conflicts with decisions of other circuits holding that de novo review is appropriate for contract formation issues. Moreover, the court of appeals' opinion implicates a deep split of authority among the circuits concerning the standard of review for "mixed" questions of law and fact. The predominant view favors de novo review of such questions, an approach that best accords with the proper role of appellate courts and the necessary limits on deference to district court determinations. Review by this Court is warranted to resolve these conflicts and provide guidance to the lower courts on these recurring and important questions of federal law.

A. The Circuits Are Divided Over The Standard Of Review Applicable To Questions Of Contract Formation

A settlement agreement resolving pending claims is a contract, and an action to enforce a purported settlement agreement is a suit for breach of contract. *See, e.g., Kokkonen v. Guardian Life Ins. Co. of America*, 114 S. Ct. 1673, 1677 (1994); *Sheng v. Starkey Laboratories, Inc.*, 53 F.3d 192, 194 (8th Cir. 1995). In this case, the district court ruled that the parties had formed a binding and enforceable settlement agreement. In reviewing that determination, the court of appeals held that "[t]his ultimately is a

fact question, and our inquiry is whether the district court was clearly erroneous in its finding." App., *infra*, 3a.

The court of appeals' decision to review only for clear error was compelled by Fifth Circuit precedent. In *Boudreaux v. ABC Insurance Co.*, 689 F.2d 1256, 1260 (5th Cir. 1982), for example, the court held that "[w]e must assume the existence of a[] . . . contract . . . unless the district court's finding to that effect is clearly erroneous." *See also Three-Seventy Leasing Corp. v. Ampex Corp.*, 528 F.2d 993, 997 (5th Cir. 1976) ("The district court's finding that a contract was formed is . . . not clearly erroneous."). In short, the Fifth Circuit applies the clearly erroneous standard of review to issues of contract formation, and it followed that approach in this case.

The Fifth Circuit is not alone in reviewing only for clear error the ultimate question whether a contract has been formed. In particular, the First Circuit also applies the clear error standard in this context. *See, e.g., Bina v. Providence College*, 39 F.3d 21, 27 (1st Cir. 1994) ("the district court's finding that no contract was formed is subject to clear error review"), *cert. denied*, 115 S. Ct. 1406 (1995); *Salem Laundry Co. v. New England Teamsters & Trucking Industry Pension Fund*, 829 F.2d 278, 280 (1st Cir. 1987) ("'[i]t is a question of fact whether any particular conduct or actions imply a contractual understanding'").

The Eleventh Circuit, by contrast, has held that the ultimate question whether a contract has been formed is one of law, and that an appellate court must independently review such determinations without deference to the trial court's conclusion. In *Augusta Aviation, Inc. v. United States*, 671 F.2d 445, 447 (11th Cir. 1982), for example, the Eleventh Circuit noted that "[a] finding that a contract exists between [the parties] is the ultimate fact, or legal

conclusion, in this lawsuit," and concluded that "[i]n drawing conclusions from subsidiary facts the ability of the trial court to apply the law properly becomes more significant than its peculiar advantage in judging the weight of the evidence. Thus, it is logical for the reviewing court to treat ultimate facts as matters of law that it may determine independently." *See also Devlin v. Ingrum*, 928 F.2d 1084, 1090 (11th Cir. 1991) (quoting *Augusta Aviation* with approval and concluding that "we will perform our own analysis of [the parties'] contract formation").[6]

Likewise, the Federal Circuit conducts an independent review of the question whether a contract has been formed, on the ground that this question is properly viewed as one of law. *See, e.g., A-Transport Northwest Co. v. United States*, 36 F.3d 1576, 1580 (Fed. Cir. 1994) ("it is necessary to resolve the threshold question of whether the Tender Agreement constituted a binding contract between the parties. This being a question of law, we are free to undertake a complete and independent analysis of it.") (citations omitted); *Daly Const., Inc. v. Garrett*, 5 F.3d 520, 521 (Fed. Cir. 1993) ("Whether there was a binding agreement flowing from this negotiation is a question of law."). Other courts have adopted this approach as well.

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[6] *See also Bobbie Brooks, Inc. v. International Ladies' Garment Workers Union*, 835 F.2d 1164, 1170 (6th Cir. 1987) (Milburn, J., dissenting) ("A determination by a court that a contract exists is a two-step determination. First, the court must determine what conduct took place, *a factual determination*. Then, it must decide what legal significance attaches to that conduct; *viz.*, whether the conduct gives rise to a legally enforceable and binding contract, *a question of law*. Therefore, a determination of whether a valid contract exists is a mixed question of fact and law which is subject to *de novo* rather than *clearly erroneous* review.") (emphasis in original).

See, e.g., In re NWFX, Inc., 864 F.2d 588, 590 (8th Cir. 1988) ("Whether or not a contract is formed in a particular instance is a question of law.").[7]

As the foregoing discussion makes clear, the circuits are in stark disagreement over the proper standard of review to be applied by a court of appeals when faced with the question whether a contract was formed between the parties. The court of appeals in this case followed Fifth Circuit precedent and reviewed only for clear error, but that approach conflicts with the decisions of the Eighth, Eleventh, and Federal Circuits cited above. Review is warranted to resolve this conflict. *See* Sup. Ct. R. 10.1(a).

B. This Case Also Implicates The Broader Question Of The Appropriate Standard Of Review Of Mixed Questions Of Law And Fact, A Question On Which The Lower Federal Courts Are In Critical Need Of Guidance From This Court

As numerous courts have held, the ultimate question whether a contract has been formed is a mixed question of

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[7] Still other circuits apply the de novo standard of review to contract formation questions in at least some circumstances. *See, e.g., Step-Saver Data Systems, Inc. v. Wyse Technology*, 939 F.2d 91, 97 (3d Cir. 1991) (reviewing de novo the district court's resolution of contract formation issues); *Mead Corp. v. McNally-Pittsburg Manufacturing Corp.*, 654 F.2d 1197, 1206-07 (6th Cir. 1981); *Diamond Fruit Growers, Inc. v. Krack Corp.*, 794 F.2d 1440, 1442 (9th Cir. 1986) (whether particular provisions are part of the parties' contract presents "questions of law reviewed *de novo*"); *Warehousemen's Union Local No. 206 v. Continental Can Co.*, 821 F.2d 1348, 1350 (9th Cir. 1987) (when "[n]one of the relevant facts are in dispute," "[t]he only question is, given these facts, did the parties have a contract as a matter of law").

law and fact.[8] This Court has defined mixed questions as those in which "the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982).

Deciding a mixed fact-law question involves three distinct steps. The first is establishing the basic historical facts. It is well settled that courts of appeals review pure factual determinations under the deferential, clear error standard. *See* Fed. R. Civ. P. 52(a). The second step is selecting the applicable rule of law. Questions of law, including state law, are reviewed under the non-deferential, de novo standard. *See Salve Regina College v. Russell*, 499 U.S. 225, 231 (1991). The third step is the application of law to fact.

Disarray pervades the case law addressing the question whether the standard of review for mixed questions of law and fact is the de novo standard applicable to issues of law or instead the clearly erroneous standard applicable to purely factual issues. As this Court recognized in 1982, "[t]here is substantial authority in the Circuits on both sides of this question." *Pullman-Standard v. Swint*, 456 U.S. at 289 n.19 (citing cases). The passage of time since this

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[8] *See, e.g., Crown Cork & Seal Co. v. Central States Southeast & Southwest Areas Pension Fund*, 982 F.2d 857, 861 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 2961 (1993); *Ransom v. United States*, 900 F.2d 242, 244 (Fed. Cir. 1990); *United States v. The Travelers Indemnity Co.*, 802 F.2d 1164, 1169 (9th Cir. 1986); *see also Bobbie Brooks, Inc. v. International Ladies' Garment Workers Union*, 835 F.2d 1164, 1170 (6th Cir. 1987) (Milburn, J., dissenting).

Court's decision in *Pullman-Standard* has not harmonized this dissonance.

At present, the Second[9] and Sixth[10] Circuits adhere to a relatively strict rule that mixed questions of fact and law are reviewed de novo on appeal. Similarly, the Fourth,[11]

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[9] *See, e.g., Travellers Int'l, A.G. v. Trans World Airlines, Inc.*, 41 F.3d 1570, 1575 (2d Cir. 1994) ("the district court's application of [the] facts to draw conclusions of law . . . is subject to *de novo* review. This standard is equally applicable to so called mixed questions of law and fact."); *Puma Indus. Consulting, Inc. v. Daal Assocs., Inc.*, 808 F.2d 982, 986 (2d Cir. 1987) ("When a conclusion represents a mixed question of law and fact, . . . that conclusion is open to full review.").

[10] *See, e.g., Equality Found. of Greater Cincinnati, Inc. v. Cincinnati*, 54 F.3d 261, 265 (6th Cir. 1995) ("mixed questions of law and fact, like pure questions of law or of statutory interpretation, are reviewed de novo"); *Paul Revere Life Ins. Co. v. Brock*, 28 F.3d 551, 553 (6th Cir. 1994) ("All of the questions before this court are either questions of law, mixed questions of law and fact, or questions of statutory interpretation. We review each of these *de novo*."); *Taylor & Gaskin, Inc. v. Chris-Craft Indus.*, 732 F.2d 1273, 1277 (6th Cir. 1984) ("[t]his court may review *de novo* findings of ultimate facts which result from the application of legal principles to subsidiary factual determinations").

[11] *See, e.g., Estate of Waters v. Commissioner*, 48 F.3d 838, 842 (4th Cir. 1995) ("mixed questions of fact and law that require the consideration of legal concepts and involve the exercise of judgment about the values underlying legal principles are reviewed *de novo*").

Eighth,[12] Ninth,[13] and Eleventh[14] Circuits apply a general rule in favor of de novo review for mixed questions.

On the other hand, the First[15] and Seventh[16] Circuits apply precisely the opposite rule, generally subjecting

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[12] *See, e.g., Cooper Tire & Rubber Co. v. St. Paul Fire & Marine Ins. Co.*, 48 F.3d 365, 369 (8th Cir. 1995) ("Mixed questions of law and fact that require the consideration of legal concepts and the exercise of judgment about the values underlying legal principles are . . . reviewed de novo.").

[13] *See, e.g., United States v. McConney*, 728 F.2d 1195, 1202, 1204 (9th Cir.) (en banc) (where "the question requires us to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles, then the concerns of judicial administration will favor the appellate court, and the question should be classified as one of law and reviewed de novo . . . . [T]he concerns of judicial administration will generally favor the appellate court, justifying de novo review"; thus, "most mixed questions will be reviewed independently"), *cert. denied*, 469 U.S. 824 (1984).

[14] *See, e.g., Vines v. United States*, 28 F.3d 1123, 1127 (11th Cir. 1994); *Weeks v. Jones*, 26 F.3d 1030, 1034 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1258 (1995); *Cox v. Administrator*, 17 F.3d 1386, 1413, *modified on other grounds*, 30 F.3d 1347 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 900 (1995); *Duke v. Smith*, 13 F.3d 388, 392 (11th Cir. 1994); *In re Grand Jury Matter No. 91-01386*, 969 F.2d 995, 997 (11th Cir. 1192).

[15] *See, e.g., City of Portsmouth v. Schlesinger*, 57 F.3d 12, 13-14 (1st Cir. 1995) (court "reviews mixed questions of fact and law for clear error"); *Williams v. Poulos*, 11 F.3d 271, 278 (1st Cir. 1993) ("The clearly erroneous standard . . . ordinarily applies when we review a trial court's resolution of mixed questions of law and fact.").

[16] *See, e.g., G.J. Leasing Co. v. Union Electric Co.*, 54 F.3d 379, 382 (7th Cir. 1995) (general rule is that "a district judge's determinations of mixed questions of fact and law, as of questions purely of fact, can be set aside on appeal only if

district court determinations of mixed questions to highly deferential review under the clearly erroneous standard.

Finally, some circuits adopt a third, middle-of-the-road approach. For example, the Tenth Circuit varies the standard of review it applies to mixed questions depending on whether the particular question is "primarily" factual or legal.[17]

Although this Court has on occasion specified the standard of review to be applied to a particular mixed question of fact and law,[18] it has declined to provide

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clearly erroneous"); *Roper v. Peabody Coal Co.*, 47 F.3d 925, 927 (7th Cir. 1995) ("We disturb a trial court's . . . determinations of mixed questions of law and fact[] only if they are clearly erroneous.").

[17] *See, e.g., Estate of F.G. Holl v. Commissioner*, 54 F.3d 648, 650 (10th Cir. 1995) ("We review mixed questions under the clearly erroneous or de novo standard, depending on whether the mixed question involves primarily a factual inquiry or the consideration of legal principles."); *In re Wes Dor, Inc.*, 996 F.2d 237, 241 (10th Cir. 1993) ("'[o]n the mixed question of whether the facts satisfy the proper legal standard, we conduct a *de novo* review if the question primarily involves the consideration of legal principles and apply the clearly erroneous standard if the question is primarily a factual inquiry.'").

[18] *See, e.g., Miller v. Fenton*, 474 U.S. 104, 112 (1985) (voluntariness of confession reviewed de novo in federal habeas corpus proceeding); *Strickland v. Washington*, 466 U.S. 668, 698 (1984) (ineffectiveness of counsel is mixed question not subject to deferential review); *Bose Corp. v. Consumers Union*, 466 U.S. 485, 501 (1984) (findings of actual malice reviewed de novo in First Amendment libel cases). In addition, a number of this Court's earlier decisions support the approach of those circuits that generally apply de novo review to mixed questions of law and fact. *See, e.g., Bogardus v. Commissioner*, 302 U.S.

broader guidance to the lower courts to assist them in determining the appropriate standard(s) of appellate review for mixed questions in general. *See, e.g., Pullman-Standard v. Swint*, 456 U.S. at 289 n.19 (declining to "address the much-mooted issue of the applicability of the Rule 52(a) standard to mixed questions of law and fact"). Indeed, the current confused state of the law is such that judicial adherents of each of the conflicting approaches to this issue find support in one or another of this Court's opinions. *Compare Travellers Int'l*, 41 F.3d at 1575 (relying on *Bose Corp. v. Consumers Union* for the proposition that the de novo standard applied to questions of law "is equally applicable to so called mixed questions of law and fact"), *with United States v. McConney*, 728 F.2d at 1202 (relying on *Pullman-Standard* for the proposition that "the concerns of judicial administration will generally favor the appellate court, justifying de novo review" of most mixed questions), and *with City of Portsmouth v. Schlesinger*, 46 F.3d at 135 (relying on *Salve Regina* for the proposition that "[t]he Court reviews mixed questions of fact and law for clear error").

Obviously, the conflicting approaches followed by the various circuits cannot all be correct. In addition to providing an opportunity to resolve the conflict over the standard of review applicable to issues of contract formation, therefore, this case offers a vehicle for clarifying the general approach to be followed by the courts of appeals in determining whether to review mixed questions for clear error or de novo.

34, 39 (1937); *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 491 (1937); *Helvering v. Rankin*, 295 U.S. 123, 131 (1935).

Of course, the Court may ultimately conclude that it is unable to prescribe a bright-line rule that provides a clear answer in every case. That possibility, however, hardly militates in favor of leaving the lower courts wholly without guidance on this question. After all, there is an extremely wide gulf between the rule that mixed questions are always or usually reviewed de novo, as in the Second, Fourth, Sixth, Eighth, Ninth, and Eleventh Circuits, and the rule that mixed questions are generally reviewed only for clear error, as in the First and Seventh Circuits. This Court can bridge that gulf and eliminate much of the inconsistency among the circuits by articulating a general approach that will govern all future inquiries into the appropriate standard of review, even if that general approach does not yield clear answers in every possible circumstance. Accordingly, the existence of this broad and continuing circuit conflict provides an independent justification for this Court's review.

C. The Questions Presented Are Recurring And Important, And Review By This Court Is Therefore Warranted

As the foregoing discussion demonstrates, the issues of the appropriate standard of review to apply to the ultimate question of contract formation and to other mixed questions of law and fact arise with great frequency in the federal courts. Even where the issue being reviewed is itself governed by state law, as is true of most contract formation issues, the question of the proper standard of review to be applied by a federal appellate court is one of federal law. *See, e.g., Salve Regina College v. Russell*, 499 U.S. 225. The recurring nature of these questions, and the absence of any indication that the existing conflicts among the circuits are diminishing with time, militates strongly in favor of this Court's review.

Moreover, the question of the proper standard of appellate review is an important one. Indeed, this Court has frequently granted certiorari in order to clarify the standard of review to be applied in particular circumstances by the courts of appeals. *See, e.g., Salve Regina College v. Russell, supra*; *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990); *Pierce v. Underwood*, 487 U.S. 552 (1988); *Pullman-Standard v. Swint*, 456 U.S. 273 (1982). As this Court recognized in *Salve Regina*, moreover, "the difference between a rule of deference and the duty to exercise independent review is 'much more than a mere matter of degree.' When *de novo* review is compelled, no form of appellate deference is acceptable." 499 U.S. at 238 (citation omitted). Significantly, de novo review would likely have resulted in a different outcome in this case. As the court of appeals observed, its decision to affirm was "close" even under the highly deferential, clear error standard of review. App., *infra*, 5a.

Accordingly, this Court should take this opportunity to articulate the proper standard for determining when a federal appellate court must conduct independent review of lower court applications of fact to law. The persistent and widespread confusion that permeates this area has created a disturbing sanctuary into which appellate courts often retreat when confronted with difficult judgments. Clear error deference substitutes for the rigorous, nuanced consideration that is the province of appellate courts. In *Salve Regina*, this Court observed that "[t]he obligation of responsible appellate jurisdiction implies the requisite authority to review independently a lower court's determinations." 499 U.S. at 231. The courts of appeals should not be permitted to evade this duty of meaningful review by applying a clear error standard in circumstances, such as those presented by this case, in which the principles underlying appellate review overwhelmingly favor de novo reconsideration.

The values informing the degree of deference accorded district court determinations demand de novo review of applications of law to fact, both in the context of contract formation and in most other circumstances as well. Deference to a trial court's findings of fact largely derives from the belief that trial judges occupy a superior position to evaluate and weigh conflicting evidence. A different set of structural concerns counsels independent appellate review of questions of law. Because appellate judges are unencumbered by the process of fact-finding, they can devote additional judicial resources to considering and deciding legal questions. *See Salve Regina*, 499 U.S. at 231-32. In addition, the three-judge format generally followed by the courts of appeals permits a collaborative deliberative process that minimizes the possibility of judicial error on questions of law. *Id.* at 232.

In the context of contract formation questions, the considerations discussed above will invariably dictate de novo review. This case presents a striking example of the importance of de novo review in this setting. The central issue here was whether the purported settlement agreement complied with the specific requirements of New York law governing enforceability of agreements between litigants, including New York's CPLR 2104, which generally requires that all settlement agreements be in writing. Resolution of this issue required the court of appeals "to consider legal concepts and to exercise judgment about the values that animate legal principles," and de novo review was therefore required. *United States v. McConney*, 728 F.2d at 1202. Instead, however, the court of appeals effectively surrendered this responsibility to the district court by reviewing that court's determinations only for clear error.

Thus, the questions presented in this petition are important and recurring, and the court of appeals resolved those questions in a manner that is incorrect, is inconsistent with

the decisions of other circuits, and likely affected the outcome in this case. Review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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August 14, 1995

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40155

DAYTON INDEPENDENT SCHOOL DISTRICT, ET AL.,

Plaintiffs,

versus

U.S. MINERAL PRODUCTS COMPANY, ET AL.,

Defendants.

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W.R. GRACE AND COMPANY-CONN.,

Defendant-Third Party
Plaintiff-Appellee,

and

DAYTON INDEPENDENT SCHOOL DISTRICT, ET AL.,

Intervenors-Appellees.

versus

ADMIRAL INSURANCE COMPANY, ET AL.,

Third Party Defendants,

and

AIU INSURANCE COMPANY, ET AL.,

Third Party Defendants,
Appellants.

Appeal from the United States District Court
for the Eastern District of Texas

(1:87-CV-00507-B)

[Filed Apr. 12, 1995]

Before, REYNALDO G. GARZA and HIGGINBOTHAM, Circuit Judges, and FELDMAN*, District Judge.

PER CURIAM:**

The background facts of this case are complex, but the issues now brought to us are straightforward. With the benefit of briefs and excellent oral argument, we affirm for essentially the reasons stated by the district court.

We have little difficulty with the jurisdiction of the trial court. Kokkonen v. Guardian Life Ins. Co. of Am., 114 S.Ct. 1673, 1677 (1994), is not apposite. The district court had diversity jurisdiction over the third party action and the

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*District Judge of the Eastern District of Louisiana, sitting by designation.

**Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

authority to enforce a settlement of that case. It is no answer that the settlement of the case before Judge Fisher did more than resolve the case pending before him. There has been no showing that the absence of Illinois National Bank was fatal to the district court's power to enforce an agreement. In short, the district court had jurisdiction, and we see no impediment to its power to enter a settlement agreement. The issue is whether there was an enforceable agreement.

The district court found that the parties had reached a binding agreement to settle the case, and that nothing remained to be done beyond the signatures on the written instrument. This finding engages paragraphs of the unexecuted written instrument, including 6.4, which recites: This "Agreement shall become effective" after the last party executes it. Other provisions of the written instrument contemplate a written document. The parties unquestionably all intended that the Settlement Agreement find expression in a formal instrument and, of course, that did not occur.

We are not persuaded, however, that the various provisions of the written document are conclusive on the question of whether the parties earlier had reached a binding oral agreement. Rather, they are signals of the parties' intent, albeit strong signals. That is, those provisions are relevant to the question of whether the parties intended to be bound before formal execution of the written instrument. This ultimately is a fact question, and our inquiry is whether the district court was clearly erroneous in its finding. We could not sustain the district court's finding but for one powerful set of circumstances--the partial performance of the contract itself. The unexecuted written instrument contemplated substantial installment payments beginning in the summer of 1993. AIG made the first two installment payments totalling $30.6 million to Grace "pursuant to the agreement in principle" and was preparing to make the third of $15.7 million in October

when on September 1, 1993, the Second Circuit decided the Maryland Casualty case. See Maryland Casualty Co. v. W. R. Grace & Co., 23 F.3d 617 (2d Cir. 1993). This settlement was negotiated in the shadow of the Maryland Casualty appeal, and that decision reduced AIG's maximum exposure under the excess policies from $523 million to $65 million.

We find the question of whether the district court's finding of the parties' intent was clearly erroneous to be close. We think the district court could conclude that these payments were partial performance of the agreement between the parties. The payments resist description as small good faith payments intended to keep the prospects of settlement alive. They were in the amount and paid at the times called for under the agreement yet to be finally signed. Adding this partial performance evidence to the mix created a fact issue regarding the parties' intent, an issue for the district court. We are not persuaded that it is clearly erroneous.

Counsel earnestly calls attention to the consequences of finding a contract from negotiating efforts of parties when their efforts have not found final expression in an executed instrument. We think those risks are allocated by the contract law of New York. These dire consequences are not posed on these unique facts. We have an agreement partially performed by payments in excess of $30 million where nothing else remained to be done in negotiations beyond the signature. While not a large percentage of the settlement sum, they remain large in absolute measure and sum to payments nearly half of AIG's total exposure after the Maryland Casualty case. The uncertainties in the Maryland Casualty case were presumably reflected in the settlement terms. A trier of fact could conclude that if the parties did not intend that the agreement to be signed was enforceable in the summer of 1993, the settlement amounts, allocating as they did the risk of an adverse appellate

decision, makes little sense. There are doubtless many explanations for these events and we do not mean to seize on one over others, or to suggest that there are not also inferences supporting the contentions of AIG. As we explained, this presents a close issue of fact. The findings of the district court were not clearly erroneous.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

DAYTON INDEPENDENT SCHOOL DISTRICT, et al.,	§	
Plaintiffs,	§	
and	§	
THE COUNTY OF ORANGE, et al.,	§	
Intervenors,	§	
VS.	§	NO. B-87-507-CA
U.S. MINERAL PRODUCTS COMPANY, W. R. GRACE & COMPANY and UNITED STATES GYPSUM COMPANY,	§	
Defendants.	§	
W. R. GRACE & COMPANY	§	
Defendant and Third Party Plaintiff,	§	
VS.	§	
ADMIRAL INSURANCE COMPANY, et al.,	§	
Third Party Defendants.	§	

[Filed Jan. 14, 1994]

On the 14th day of October, 1993, Third-Party Plaintiff W. R. Grace & Co.-Conn. ("Grace") moved the Court to enforce a settlement agreement entered into among Grace and Third-Party Defendants AIG Insurance Company, American Home Assurance Company, Birmingham Fire Insurance Company, Granite State Insurance Company, Lexington Insurance Company, National Union Fire Insurance Company of Pittsburgh, New Hampshire Insurance Company, and The Insurance Company of the State of Pennsylvania (the "AIG Companies" or "AIG"). On October 22, 1993, Plaintiffs and Intervenors joined in Grace's motion. On October 28, 1993, the AIG Companies filed their response to the Motion to enforce. The Court conducted an evidentiary hearing on November 2 and 3, 1993.

Having considered the motions and response, the testimony and documentary evidence introduced during the course of the evidentiary hearing, and the supplemental briefing submitted by all parties, the Court now makes and files these Findings of Fact and Conclusions of Law. To the extent that any Finding of Fact should be deemed a Conclusion of Law, it is to be so considered; to the extent that any Conclusion of Law should be deemed a Finding of Fact, it is to be so considered.

FINDINGS OF FACT AND CONCLUSIONS OF LAW LAX

FINDINGS OF FACT

I.

The AIG Companies are insurance companies that sold excess liability insurance policies that provided a total of $528.3 million in coverage to Grace (Tr. 22). By virtue of these policies, the AIG Companies agreed, upon the exhaustion of the limits of certain underlying policies, to indemnify Grace for claims asserted against Grace in products liability litigation. The AIG Companies also

agreed to pay defense costs incurred by Grace in connection with such suits. One such suit is the underlying action in which Grace was named a defendant by Plaintiffs and Intervenors ("Intervenors") in May of 1988.

2.

The policy amount, year, number, layer of coverage, underlying limits, and the layer amount for each AIG Company is reflected in Exhibit A to the April 27, 1993 letter of Jeff Posner ("Posner"), Grace's Assistant Vice President and Director of Corporate Risk Management (Plaintiff's Exhibit 23 ("P-23")).

3.

Intervenors are sixty-two Texas counties, cities, school districts, and junior colleges, and other public entities that either own or control more than 250 buildings in Texas built in the 1950s, 1960s and 1970s. Intervenors sought recovery of damages allegedly caused by the installation of asbestos-containing products in their buildings.

4.

On November 26, 1991, Grace filed the instant third-party action against certain excess carriers, including the AIG Companies, seeking to recover the cost associated with the defense of the underlying action and indemnity for any recovery which Intervenors might obtain by judgment or settlement.

5.

On July 1, 1992, Intervenors and Grace entered into a Memorandum of Compromise Settlement Agreement (Intervenors' Ex. 1). This agreement includes an assignment of $25 million of Grace's claims and causes of action against its excess carriers, including AIG. In the event Grace settles with an excess carrier such as AIG, Section 3.1 of the Memorandum Agreement provides that Intervenors recover 10.1968 percent of such settlement (Intervenors' Ex. 1, ¶ 3.1).

As a consequence of the assignment, Intervenors on April 3, 1992 moved to intervene as plaintiffs in the instant third-party action, seeking to assert their own direct claim against the third-party defendant excess insurance carriers. The intervention was granted on May 7, 1992.

6.

In May 1992, representatives of AIG and Grace met in New York to discuss settlement of their coverage dispute (Tr. 23). AIG was represented by George Vallone ("Vallone"), Director of High Profile Claims for American International Adjusting Company, and Jeff Carlisle ("Carlisle"), an attorney for AIG (Tr. 23, 147-148). Grace was represented by Bob Beber ("Beber"), General Counsel, and Jeff Posner, Assistant Vice President and Director of Corporate Risk Management (Tr. 20, 23). During the May 1992 meeting, Vallone suggested that AIG pay a certain percentage of Grace's defense and indemnity costs on an ongoing basis without regard to trigger of coverage and, in turn, that Grace discount the total coverage afforded by the AIG policies (Tr. 23, 148).

7.

A second meeting between Grace and AIG representatives was held in AIG's office in New York in September 1992 (Tr. 24). At this meeting, AIG offered to settle the coverage dispute by paying fifteen percent (15%) of Grace's ongoing asbestos costs with an immediate cash payment of fifteen percent (15%) and a cap on all receivables of $280 million (P-1).

8.

On November 19, 1992, Posner sent a letter to Vallone concerning a proposed settlement meeting on November 30. In that letter, Grace submitted its proposal for settlement, "[s]ubject to approval by Grace's Board of Directors . . . ." (Defendants' Exhibit 1 ("D-1")). The letter stated that Grace's proposal was "contingent upon Grace and AIG working out an acceptable settlement agreement." (Id.)

The offer of settlement made by Posner in the November 19, 1992 letter was not accepted by AIG.

9.

A third meeting was held in New York on November 30, 1992, with Beber, Posner, Hughes and Vallone in attendance (Tr. 24, 150). At the time, all the AIG Companies with the exception of Lexington Insurance Company and Birmingham Fire Insurance Company were participating in the negotiations (P-3). The parties reached an agreement in principle whereby:

a. AIG would pay ten percent (10%) of Grace's asbestos receivables prior to December 31, 1992;

b. AIG would pay twenty percent (20%) of Grace's future defense and indemnity costs after January 1, 1993; and

c. Grace would discount AIG's total coverage by twenty percent (20%) to $380 million dollars (Tr. 24-25).

10.

Lexington Insurance Company and Birmingham Fire Insurance Company subsequently decided to participate in the AIG settlement with Grace (Tr. 72, 286). With the added participation of Lexington and Birmingham, the total settlement amount increased to $419 million, and the respective percentages increased from ten percent (10%) to eleven percent (11%) and from twenty percent (20%) to twenty-two percent (22%).

11.

Illinois National Insurance Company is party to the Settlement Agreement, but is neither a party to this litigation nor otherwise before this Court.

Illinois National Insurance Company issued $5 million in excess insurance coverage to Grace (P-2; Tr. 71). If Illinois National Insurance Cowpony is not included in the settlement agreement, the total coverage available pursuant

to the agreement would be reduced from $419 million to $415 million, and the liability of each remaining AIG insurer would be determined by the procedure set forth in Exhibit B to the April 23, 1993 Draft Settlement Agreement (D-15; P-43).

12.

The Agreement in Principle reached on November 30, 1992 includes certain new basic economic terms that varied from those set forth in Posner's letter of November 19, 1992 (Tr. 150-152, 213-214).

The parties specifically agreed that the Agreement in Principle was subject to two (2) conditions: (1) the approval of Grace's Board of Directors; and (2) approval by AIG's reinsurers (Tr. 152).

13.

While both parties expected that a written agreement would be executed at some point in time, neither AIG nor Grace indicated that execution was "a condition of the agreement" (Tr. 36, 136-137, 166).

On December 4, 1992, Posner wrote a letter to Vallone setting forth a "to do list." One of the items to be done was for the lawyers to start preparing draft agreements (D-2).

During the latter part of December 1992 and continuing through April 1993, there were ongoing discussions between AIG and Grace representatives concerning the resolution of outstanding issues (Tr. 25-26).

14.

George Vallone was designated by Jack Hughes, Senior Claims Vice-President, as the "point man" or "spokesperson" for AIG in its negotiations with Grace (Tr. 183, 256). Vallone was authorized to enter into an agreement concerning the economic terms (Tr. 160) as well as the details of the settlement agreement (Tr. 256). Hughes did not personally involve himself in details of the agreement;

rather, he relied on Vallone to perform these tasks (Tr. 256).

15.

On January 28, 1993, AIG's counsel Carlisle forwarded to Grace a draft of the Proposed Agreement (the "January 28 Draft") that: (1) had not been reviewed or approved by his clients, and (2) did not address various elements of the contemplated ultimate agreement (D-3).

Subsequent to the January 28 Draft, additional drafts were exchanged in February, March, and early April 1993, as the parties continued to reach concurrence on the remaining issues (P-6, P-12 and P-14).

16.

Pursuant to the agreement in principle, representatives of the AIG Companies came to Grace's headquarters in Boca Raton, Florida to examine documents concerning settlements and expenses paid by Grace for asbestos-related claim (Tr. 27). On March 23, 1993, AIG examined the documents reflecting payments made by Grace through December 31, 1992 (Tr. 27). The March 1993 audit was in anticipation of the payments due Grace in June and August 1993.

17.

While Vallone was present at Grace's headquarters in March 1993, he and Carlisle met with Posner to discuss the outstanding issues (Tr. 155). These issues included (1) how funds would be paid; (2) the timing of payments; (3) the claims handling procedure and/or authority; and (4) contribution from other carriers who may or may not have settled (Tr. 156). The most difficult issue that remained unresolved was the claims handling procedure (Tr. 42, 43).

18.

Between the March 22-23, 1993 and the March 30, 1993 meeting of reinsurers at Grace headquarters, there were a series of telephone conference calls between Wright, Beber, Posner and Vallone which resulted in the resolution of sev-

eral outstanding issues, including the claims handling procedure (P-14; Tr. 77-79, 93-97, 158-159, 210-211, 218).

19.

AIG met with its reinsurers on March 30-31, 1993 (Tr. 28, 159) to outline the proposed settlement and to obtain the reinsurers' approval (P-9; Tr. 28). It appears that the reinsurers had no problems with the agreement (Tr. 125), as AIG admits that its repudiation of the agreement was not due to inability to obtain the reinsurers' concurrence (Tr. 160-161).

20.

On April 1, 1993, W. R. Grace & Co.'s Board of Directors considered and approved the proposed settlement.

On April 5, 1993, W. R. Grace & Co.-Conn.'s Board of Directors considered and approved the proposed settlement.

21.

In April 1993, representatives of the parties continued to review and refine the language in the settlement agreement. On April 23, 1993, Carlisle forwarded to Posner a draft settlement agreement which reflected changes in the terms discussed during the previous weeks (P-21). Subsequently, there were several telephone conference calls between Posner, Siegel, Beber and Carlisle in which the remaining issues were discussed and language addressing these issues was hammered out (Tr. 292). Carlisle was advised that the "Agreement, with the minor changes they had agreed to, was acceptable" to Grace (Tr. 56). Posner was subsequently advised that the terms set out in the April 23, 1993 draft settlement agreement were acceptable to AIG (Tr. 26, 58).

22.

The parties reached an agreement concerning the essential terms of the settlement agreement in late April or early May, 1993 (Tr. 26, 37). These essential terms, as reflected in the April 23, 1993 Draft Settlement Agreement (Tr. 53), include the following: payment (P-21, §§ 3.0-3.09; Tr.

203); mutual releases (P-21, §§ 5.2, 5.3); contribution claims among the various defendant insurers (P-21, § 2.2); allocation of liability among the AIG Companies (P-45; D-15; Tr. 202-203); press releases (P-21, § 6.3; Tr. 209); and the handling of claims disputes (P-21, §§ 4.0-4.3; Tr. 210-211, 287-290). Neither AIG nor Grace ever executed a document constituting the Settlement Agreement.

In May 1993, Grace asked AIG to extend the time for Grace to obtain dismissals of coverage litigation against AIG, in view of the delay in obtaining execution of the Settlement Agreement (D-18).

23.

On June 11, 1993, a payment of $15.3 million was made by AIG to Grace pursuant to "an agreement in principle" (D-19). This payment reflected one-half (1/2) of the amount due Grace for defense costs and indemnity payments incurred by Grace through December 31, 1992 (P-21, § 3.1; Tr. 27).

After receipt of the June 1993 payment, Grace inquired of AIG when Grace might receive the signed agreement. AIG stated that the agreement was being circulated, that some signatures had been obtained, and that the few remaining signatures would be obtained shortly (Tr. 61, 87). AIG further stated that it had made provisions for the August 30, 1993 payment scheduled in the agreement in the sum of $15,300,000 (Tr. 29, 169; P-21, § 3.1).

24.

On August 30, 1993, Grace received the second payment of $15.3 million as required by Paragraph 3.1 of the Settlement Agreement (P-32; Tr. 203). AIG's letter of transmittal indicated that the payment was being made pursuant to the "agreement in principle" (P-32; Tr. 203).

The parties did not agree nor did AIG ever represent that the payments due on June 15 and August 30, 1993 were to be credited against any future settlement agreement they might enter into (Tr. 37, 93).

25.

In reliance on the oral agreement, Grace (1) reflected the settlement amount with AIG in its filings with the Securities and Exchange Commission (Tr. 31, 109); (2) sought written approval from AIG before issuing press releases as required by § 6.3 of the Settlement Agreement (Tr. 225; P-21, § 6.3; P-28); (3) made a payment to the Intervenors out of amounts paid to Grace by AIG (Tr. 69); (4) stayed discovery against the AIG Companies in this and other pending coverage litigation (P-4); (5) submitted to the AIG Companies monthly status reports on asbestos-related claims asserted against Grace (Tr. 45-47; P-33a); (6) took steps to have the AIG Companies dismissed from coverage litigation in Minnesota state court and arranged that AIG not be named as defendants in two new coverage actions in state court in Minnesota (Tr. 64, 90; P-33b); (7) granted its local counsel in this case a waiver of a potential conflict of interest to enable its local counsel to represent an AIG Company in other litigation simultaneously with local counsel's representations of Grace in this litigation (Tr. 140, 145; P-44); and (8) accepted discounted payments based on the agreed reduction in the amount of coverage provided by excess policies issued to Grace by AIG.

26.

Throughout the Summer and early Fall of 1993, AIG repeatedly reassured Grace that there are no open terms or outstanding disagreements, that the agreement was undergoing internal review, that the delay in signing was because people are on vacation, and that signing was imminent (Tr. 81, 86-87, 100-101, 134-135, 236). The parties continued to perform their respective obligations under the agreement without incident through September of 1993. On September 1, 1993, AIG again came to Boca Raton to examine documents reflecting payments made by Grace through the first half of 1993 (Tr. 28, 172). The September 1993 audit was performed in anticipation of payment due Grace on

October 15, 1993 for payments made by Grace for the first quarter of 1993 (Tr. 28, 172). In fact, on September 3, 1993, AIG informed Grace that the agreed upon third payment due Grace on October 15, 1993 would be paid in a timely manner (Tr. 115, 177).

On or about September 1, 1993, at a meeting in Grace's Boca Raton offices, Posner told Vallone that dismissals of Grace litigation claims against AIG would be furnished only after there was an executed agreement (Tr. 174-175).

27.

On October 7, 1993, the AIG Companies informed Grace that they were no longer going to abide by the terms of the agreement (P-38). The only reason given by AIG for this action was the decision handed dawn in Maryland Casualty Co. v. W. R. Grace & Co. - Conn., et al., No. 91-9322 (2d Cir. Sept. 1, 1993) (P-38). In that case, the Second Circuit held that the appropriate trigger for coverage of property damage was "damage in fact," and that such damage occurred at the date of installation. AIG informed Grace that because of the "substantial impact" the Second Circuit opinion had on AIG's exposure, AIG would no longer go forward under the agreement (P-38). As a result of the opinion, AIG's exposure would be reduced from the $419 million provided in the settlement agreement to approximately $60 million (Tr. 91; AIG Response filed Oct. 28, 1993, at p. 4). The agreed upon October 15, 1993 payment was never made to Grace.

28.

Vallone's statement at the evidentiary hearing that the decision not to go forward with the agreement with Grace was not related to the Second Circuit decision in Maryland Casualty is contradicted by his October 7, 1992 letter to Posner, as well as statements by Hughes and counsel for AIG. Likewise, Vallone's and Hughes' denial of the existence of an agreement in principle after November 30, 1992 is at odds with Carlisle's letter of January 28, 1993, which

provides in part, "based upon my understanding of the terms of the settlement reached between our clients . . . ," with AIG's payment of $30.6 million, and with the provisions for an additional payment of $15.7 million, each of which coincides with the specific terms and provisions of the April 23, 1993 Draft Settlement Agreement.

29.

AIG claims that the parties failed to reach an agreement concerning the following matters: (1) payout schedules; (2) specifics of releases; (3) resolution of disputes under the agreement; (4) allocation of liability among the reinsurers; (5) resolution of claims among Third-Party Defendant insurers; and (6) necessity for and format of press releases (AIG Response filed Oct. 28, 1993, at p. 3). The credible evidence, however, indicates that these issues were resolved by May 1993.

30.

AIG's assertion that the issue of payment schedules remains unresolved is unfounded. Both the April 1 draft of the settlement agreement prepared by Siegel after the March meeting and discussions, and the April 23, 1993 draft prepared by Carlisle provide that AIG would pay one-half (1/2) of the monies due for receivables paid by Grace prior to December 31, 1992 on June 15, 1993, and the remaining one-half (1/2) on August 30, 1993. The parties also agreed that AIG's payment for defense costs and indemnity payments made by Grace during the first quarter of 1993 would be due on October 15, 1993 (Tr. 203).

31.

Grace did not dismiss any of the coverage litigations against AIG or file any other dismissals of claims against AIG prior to September 1993 (Tr. 275-276). The parties had agreed, however, that dismissals without prejudice would be exchanged concurrently with the execution of the settlement agreement (P-21, §§ 5.0 and 5.1). Grace, in turn, was to obtain dismissal with prejudice "for itself and

all others who have filed claims based on an assignment of insurance coverage from Grace . . . . ," (P-21, § 5.0) upon their receipt of payments under Section 3.1. Thus AIG was not entitled to obtain dismissal with prejudice in regard to the Minnesota action until payment of the $30.6 million. In accordance with the agreement, immediately after receipt of payment, Grace sought and obtained approval from the Minnesota plaintiffs to dismiss AIG from those proceedings (P-34; Tr. 90).

32.

During the negotiations, the parties discussed using alternate dispute resolution procedures. In Siegel's April 1, 1993 draft (P-14), a place was left for the possible inclusion of a dispute resolution process (P-14, § 6.4). While this issue was discussed, the parties agreed that there would be no dispute resolution process (Tr. 49, 294) or requirement to resolve all differences by submitting them to a court of competent jurisdiction. Instead, the respective rights of each party would be left open, and each party could use the procedures it considered appropriate (Tr. 289-290).

33.

It is undisputed that the allocation of liability between the respective AIG insurers was resolved by the adoption of Exhibit B attached to the April 23, 1993 Draft Settlement Agreement (D-15; P-43; Tr. 293).

34.

The process for addressing outstanding claims among Third-Party Defendant insurers was timely resolved. A comparison of Section 2.2 of the January 28 Draft (P-5) and the language in the April 23, 1993 Draft Settlement Agreement reflects that there is little, if any, substantive change (P-21). Even though Posner sent proposed language changes in Section 2.2 on April 26, 1993 (P-22), the evidence indicates that Posner advised Carlisle to disregard the suggested changes (Tr. 58).

35.

The parties agreed upon a claims handling process which involved three (3) separate steps (Tr. 77-79, 97-98, 159, 210-211, 218). The procedure is reflected in section 4.3 of the April 23, 1993 Draft Settlement Agreement, and generally provides that

a. if the settlement is less than $7.5 million, Grace will notify AIG of the proposed settlement, and AIG will reimburse Grace twenty-two percent (22%) (Tr. 78, 210, 288);

b. if the settlement amount proposed by Grace is in excess of $7.5 million but less than $20 million of the amount recommended by AIG's Designated Representative, the parties will attempt to reach an agreement as to a reasonable settlement amount. If the parties are unable to reach an agreement, Grace is entitled to proceed with the settlement and AIG will reimburse Grace twenty-two percent (22%) of the payment. Thereafter, the Vice Chairman of Grace and the Senior Claims Vice President of AIG will seek to agree upon a reasonable amount. If these parties determine that the amount is less than agreed to by Grace, then Grace shall refund to AIG an amount equal to twenty-two percent (22%) of the excess (Tr. 78, 159, 210, 288); and

c. if the amount proposed by Grace is $20 million or more than the amount proposed by AIG's Designated Representative, Grace will delay settlement for as long as possible. Discussions will be held between the Senior Claims Vice President of AIG and the Vice Chairman of Grace, and should the parties be unable to agree on a reasonable settlement amount, AIG shall reimburse Grace twenty-two (22%) percent of the

amount recommended by AIG's Designated Representative (Tr. 210-211, 289-290).

36.

The parties have substantially complied with Rule 2104, N.Y. Civ. Prac. L. & R. ("CPLR 2104").

37.

The parties have substantially performed under the settlement agreement.

CONCLUSIONS OF LAW

I.

There is complete diversity between Grace, the Intervenors and the AIG Companies, and the amount in controversy exceeds the Court's jurisdictional limits. The Court, therefore, has subject matter jurisdiction over the instant third-party action under 28 U.S.C. § 1332.

II.

The absence of one of the AIG Companies, Illinois National Insurance Company, from the third-party action does not deprive the Court of jurisdiction to enforce the settlement agreement. AIG concedes that the agreement provides a precise mathematical formula for allocating the payments owed by each member of AIG (Tr. 154, 295-296). Thus, the Court can frame the judgment enforcing the agreement in a manner that does not adversely affect Illinois National Insurance Company.

III.

This Court has the inherent authority to enforce a settlement agreement that disposes of the coverage claims asserted by Grace in the instant third-party action. White Farm Equipment Co. v. Kupcho, 792 F.2d 526, 529 (5th Cir. 1986); Air Crash Disaster v. Eastern Airlines, Inc., 687 F.2d 626, 629 (2d Cir. 1982); Vari-O-Matic Machine Corp. v. New York Sewing Machine Attachment Corp., 629 F. Supp. 257, 258 (S.D.N.Y. 1986). When parties have settled their claims, they thereby "consent to the exer-

cise of the court's power to compel compliance." Cooper-Jarret, Inc. v. Central Trans., Inc., 726 F.2d 93, 96 (3d Cir. 1984).

IV.

Whether a settlement agreement constitutes a binding contract is determined by reference to the substantive state law governing contracts generally. White Farm Equipment, 792 F.2d at 529. The parties agree that the application of Texas choice of law rules requires that New York law govern this dispute.

Under New York law, parties are given the power to bind themselves either informally or by a formal signed writing. R. G. Group, Inc. v. Horn & Hardart Co., 751 F.2d 69, 74 (2d Cir. 1984); Texaco, Inc. v. Pennzoil, 729 F.2d 768, 788 (Tex. App. -- Houston [1st Dist.] 1987, writ ref'd n.r.e.), cert. dismissed, 485 U.S. 994 (1988) (applying New York law). This freedom to contract orally remains even if the parties contemplate a writing to evidence their agreement. In such a case, the mere intention to commit the agreement to writing will not prevent contract formation prior to execution. Winston v. Mediafare Entertainment Corp., 777 F.2d 78, 80 (2d Cir. 1985).

VI.

The intent of the parties determines when a contract is formed. Winston, 777 F.2d at 80. To determine intent, a court must look to the words and deeds of the parties which constitute the objective signs of such intent. Brown Bros. Elec. Contractors, Inc. v. Beam Construction Corp., 361 N.E.2d 999, 1001 (N.Y. 1977); Winston, 777 F.2d at 80. No single act, phrase or other expression is paramount. Instead, the focus is on the totality of all these, given the attendant circumstances, the situation of the parties, and the objectives they were striving to obtain. Brown Bros., 361 N.E. 2d at 1001; Four Seasons Hotel Ltd. v. Vinick, 515 N.Y.S. 2d 1, 5-6 (App. Div. 1987).

VII.

The New York courts have articulated four (4) factors to determine if the parties contemplated being bound by an oral contract or a written agreement. Winston, 777 F.2d at 80; R. G. Group, Inc., 751 F.2d at 75-76; Shearson, Lehman CMO, Inc. v. T. C. Banking & Savings, 710 F. Supp. 67 (S.D.N.Y. 1989). The court is to consider (1) whether there has been an express reservation of the right not to be bound in the absence of a writing; (2) whether there has been a partial performance of the contract; (3) whether all of the terms of the alleged contract have been agreed upon; and (4) whether the agreement at issue is the type of contract that is usually committed to writing. Winston, 777 F.2d at 80. "No single factor is decisive, but each provides significant guidance." R. G. Group, Inc., 751 F.2d at 75.

VIII.

Express Reservation. "Considerable weight is placed on a party's explicit statement that it reserves the right to be bound only when a written agreement is signed." R. G. Group, Inc., 751 F.2d at 75. Even though AIG anticipated that the agreement would be reduced to writing, it never expressly reserved the right not to be bound prior to the execution of the agreement in any of the discussions or correspondence with Grace. The first mention of any such reservation came in Carlisle's January 28, 1993 draft of the settlement agreement. Paragraph 6.4 of the agreement provides, "this Agreement shall become effective . . . after the date the last party shall have executed this Agreement . . . ." The only other substantive reference to "execution" in the agreement appears in sections 5.0-5.1, where the term is used to regulate the timing of mutual dismissals of pending coverage claims by the parties (P-21, § 5.0). While the inclusion of this language in the draft settlement agreement is a reasonable signal that AIG did not intend to be bound by the agreement until execution, the Court

concludes that, based on the actions of the parties, section 6.4 was not used to impose an express precondition to the formation of the contract. At most, it was used to indicate the timing of various acts that were to occur. See Texaco, Inc. v. Pennzoil, Co., 729 S.W.2d at 791.

IX.

Partial Performance. New York courts regard the second factor, partial performance, as "an unmistakable signal that one party believes there is a contract; and the party who accepts the performance, by the act, signals that it also understands a contract to be in effect." R. G. Group, Inc., 751 F.2d at 75-76; Viacom Int'l Inc. v. Tandem Products, Inc., 368 F.Supp. 1264, 1270 (S.D.N.Y. 1974), aff'd, 526 F.2d 593 (2d Cir. 1975). AIG's acceptance of discovery stays in pending coverage litigation, not being named in new coverage lawsuits, and the granting by Grace of a waiver of a potential conflict of interest so that National Union Fire Insurance Company could obtain the services of Grace's local counsel in other litigation clearly signaled that AIG understood the agreement to be in effect, even though it was not signed. Grace, in turn, by accepting discounted payments from the AIG Companies clearly signaled that Grace understood the agreement to be in effect, even though it was not signed.

Agreement on Essential Terms. The third factor, agreement on all essential terms, is also present here. The evidence adduced at the hearing amply shows that, by May of 1993, issues that AIG now contends remained "open" had been resolved. When, as here, the parties have agreed to the substantial terms of the agreement and have left nothing material for future settlement, New York courts will enforce the agreement even though it is not technically fully executed. Municipal Consultants & Publishers, Inc. v. Ramapo, 390 N.E.2d 1143, 1145 (N.Y. 1979); R. G. Group, Inc., 751 F.2d at 74.

XI.

It is plain that all terms contemplated by an agreement need not be fixed with complete and perfect certainty for a contract to have legal efficacy. Parke & Hotel, Inc. v. Messing, 31 Misc. 2d 961, 224 N.Y.S.2d 179 (1962); V'soske v. Barwick, 404 F.2d 495, 500 (2d Cir. 1986), cert. denied, 394 U.S. 921 (1969). By the end of April, the parties had reached an agreement as to all key terms, and all that remained was to correct typographical errors or misprints, include such information as how the wire transfers were to take place, and provide payee and transfer instructions.

XII.

Agreement Usually Written. The fourth and final factor to be considered is whether the agreement is the sort that is usually written. It is undisputed that both parties expected that the agreement would be reduced to writing. However, as previously discussed, "the mere fact that the parties contemplate memorializing their agreement in a formal document does not prevent their informal agreement from taking effect prior to that event. V'soske, 404 F.2d at 499. The nature of this agreement, however, and the amount in issue clearly indicates that the agreement would normally be reduced to writing.

XIII.

Having considered and weighed all of the evidence pertaining to the foregoing four (4) factors in light of the words and deeds of the parties, the Court is of the opinion that the parties amply manifested their intent to be bound by the agreement they reached to settle their coverage disputes, even though it was not reduced to writing and executed. The payment of $30.6 million by AIG to Grace, which follows precisely the terms of section 3.1 of the Settlement Agreement, as well as the undisputed testimony that AIG would make an additional $15.7 million payment in October 1993, simply cannot be rationally explained

unless the payments arose from obligations created by the existence of a binding contract.

XIV.

EXECUTORY ACCORD

New York General Obligations Law, § 15-501, provides in pertinent part, as follows:

Section 15-501. Executory Accord.

1. Executory accord as used in this section means an agreement embodying a promise expressed or implied to accept at some future time a stipulated performance in satisfaction or discharge in whole or in part of any present claim, cause of action, contract obligation and a promise expressed or implied to render such performance in satisfaction or in discharge of such claim, cause of action, contract obligation.

AIG contends that the agreement is an executory accord, as defined in Section 15-501, New York Obligations Law, and therefore must be signed to be effective. However, an agreement is an executory accord only if "the claim was not to be discharged until the agreed satisfaction was fully performed. Langlois v. Langlois, 169 N.Y.S.2d 170, 173 N.Y. App. Div. (1957). By contrast, a superseding agreement, which is not required to be executed, is one in which the original claim is extinguished at once and the defendant's promise to pay the amount of the settlement is substituted for the original claim. . . ." Id. The agreement at issue here is a superseding agreement, and not an executory accord. As evidenced in section 5.2 of the agreement, Grace granted a present release of its asbestos-related coverage claims against AIG upon AIG's promise to pay in the future. Grace concurrently accepted AIG's promise to perform as present satisfaction, thereby extinguishing AIG's previous obligations under the excess policies on AIG's making of its new promise. The cases cited by AIG in support of its executory accord argument

are factually distinguishable because they involve agreements "to accept performance, in futuro, as future satisfaction of an old agreement or dispute." Goldbard v. Empire State Mutual Life Ins. Co., 171 N.Y.S.2d 194, 199 N.Y. App. Div. (1958); In re Drexel Burnham Lambert Group, Inc., No. 90 CIV 6954, 1993 WL 417808, WL at 6 (S.D.N.Y. Oct. 19, 1993).

XVI.

New York courts will not hold even an executory accord unenforceable for lack of a writing "where the party opposing it has engaged in conduct approaching fraud." Hansen v. Prudential Lines, Inc., 461 N.Y.S. 2d 670, 675 (Sup. Ct. 1983). Here, AIG intentionally represented to Grace that there were no further matters to be negotiated, and that because there were no problems, the agreement would be signed imminently. Grace relied on those representations to its detriment. In such a situation New York courts will not reward deception, but will enforce even an otherwise technically unenforceable executory accord. Id. Where, as here, the agreement is not an executory accord, but a superseding agreement, the public policy reasons for refusing to reward deception are even more compelling.

XVII.

To deny enforceability of the settlement agreement between AIG and Grace due to the lack of a signed writing, would reward AIG for its deception. AIG admits that it was aware, as early as May 1993, that Grace understood that there was a binding agreement. Far from denying the existence of the settlement agreement, AIG's conduct both invited and encouraged this understanding, and AIG should not be rewarded for its deception.

XVIII.

STATUTE OF FRAUDS

The New York Statute of Frauds, § 5-701(a)(1), provides that a contract that cannot be performed within one year is void "unless it or some note or memorandum thereof [is] in

writing, and subscribed by the party to be charged. . . ." N.Y. Gen. Oblig. Law § 5-701 (McKinney 1978). The one-year provision of the statute of frauds is construed narrowly to give effect to oral contracts which are capable of being performed within one year. Weisse v. Engelhard Minerals & Chemicals Corp., 571 F.2d 117, 119 (2d Cir. 1978). The contract need not actually be performed within one year to avoid the proscription of the statute. All that is required is that "performance be possible within the year, however unlikely or improbable that may be. . . ." Silberberg v. Haber, 345 N.Y.S.2d 558, 360 (App. Div. 1973), quoting Nat Nal Service Stations v. Wolf, 107 N.E.2d 473, 475 (N.Y. 1952). Carlisle, counsel for AIG, testified that it was theoretically possible "for the AIG Companies to reach their maximum payment under the agreement within one year." (Tr. 296) The statute requires nothing more. The Court finds that Section 5-701(a)(1) does not bar enforcement of the agreement.

XIX.

NEW YORK CIV. PRAC. L. & R. 2104

Rule 2104, N.Y. Civ. Prac. L. & R. provides,

> An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered.

XX.

Where there is substantial compliance with Rule 2104, New York courts will enforce a settlement agreement, even though the technical requirements of Rule 2104 have not been fully met. E.g., A. J. Tenwood Assocs. v. U. S. Fire Ins. Co., 428 N.Y.S.2d 606, 607 (Sup. Ct. 1980); Golden Arrow Films, Inc. v. Standard Club of California, Inc., 328 N.Y.S.2d 901, 902 (App. Div. 1972); Van Ness v. Rite-Aid of New York, Inc., 514 N.Y.S.2d 570, 571 (App. Div. 1987). The extensive writings of the parties, in-

cluding the April 23, 1993 draft settlement agreement and the letters of AIG transmitting the June and August 1993 payments to Grace, illustrate that the agreement substantially complies with the provisions and intent of Rule 2104.

XXI.

New York courts will also enforce an oral out-of-court settlement agreement where the elements of estoppel are present. E.g., Conlon v. Concord Pools, Ltd., 565 N.Y.S.2d 860, 862 (App. Div. 1991); Smith v. Lefrak Organization, Inc., 531 N.Y.S.2d 305, 306 (App. Div. 1988); Van Ness v. Rite-Aid of New York, Inc., 514 N.Y.S.2d at 571; Tenwood, 428 N.Y.S.2d at 607, 608. The estoppel exception has its basis in the following rationale:

> A party may be prevented from invoking CPLR 2104 to avoid an oral out-of-court stipulation if it appears that the stipulation was in fact made and relied upon by the adverse party. The decisions so holding recognize that the rule requiring a writing is one of convenience designed to relieve the courts from having to resolve embarrassing factual disputes between counsel and sometimes between counsel and the court, as to the making and terms of the stipulation; and they refuse to permit its use against a party who has been misled or deceived by the oral stipulation to his detriment.

Tenwood, 428 N.Y.S. 2d at 608 (quoting 2A WEINSTEIN-KORN-MILLER, NEW YORK CIVIL PRACTICE, ¶ 2104.04, pp. 21-32). AIG, by its words and deeds, both invited and encouraged Grace to rely on the oral settlement agreement. Because Grace has detrimentally relied on the settlement agreement, AIG is estopped from invoking Rule 2104 as a basis for repudiating that agreement.

XXII.

A third exception to the requirements of Rule 2104 exists where the parties act upon or perform under the oral agree-

ment. Schwartz v. Leasehold Corp. of New York, 48 N.Y.S.2d 146, 147 (App. Div. 1944); Greenidge v. City of New York, 578 N.Y.S.2d 157, 158 (App. Div. 1992); Macrina v. Macrina, 78 N.Y.S.2d 244, 245 (Sup. Ct. 1947). The credible evidence clearly shows that both parties have taken significant actions under the precise terms of the settlement agreement.

XXIII.

The only credible reason explaining AIG's repudiation of the settlement agreement in October 1993 is the September 1, 1993, decision of the United States Court of Appeals for the Second Circuit in the Maryland Casualty case. In light of the parties' performance pursuant to the terms of the settlement agreement throughout the Summer and Fall of 1993 prior to the Maryland Casualty opinion, AIG's contention that the settlement agreement should be barred because of Rule 2104 "defies common sense and runs counter to the salutary policy that stipulations are favored by the courts . . . ." Van Ness, 514 N.Y.S.2d at 571.

XXIV.

New York courts, like those in Texas, have long favored settlement of disputed claims. See, e.g., ABKCO Music, Inc. v. Harrisinger Music Ltd., 722 F.2d 988 (2d Cir. 1983); Bass v. Phoenix Seadrill/78 Ltd., 749 F.2d 1154, 1164 (5th Cir. 1985); Dankece v. Defense Logistics Agency, 693 F.2d 13, 16 (5th Cir. 1982); Lyons v. Cunningham, 583 F. Supp. 1147, 1158 (S.D.N.Y. 1983). Moreover, New York law is clear that parties are not entitled to reopen voluntary settlement agreements to take advantage of subsequent changes in the law. Cutler v. Travelers Ins. Co., 552 N.Y.S.2d 998, 159 A.D.2d 1014 (App. Div. 1990); Ianielli v. North River Ins. Co., 506 N.Y.S.2d 970, 119 A.D.2d 317 (App. Div. 1986). It is apparent that this is what has occurred in this case. AIG negotiated a deal which substantially reduced its exposure to asbestos-related claims that might be asserted against

Grace, only to see what it now describes as a "cataclysmic event" -- the Second Circuit's September 1, 1993, Maryland Casualty ruling. This subsequent change in law does not justify the repudiation of a binding settlement agreement.

XXV.

AIG and Grace entered into a binding agreement to settle their dispute concerning excess insurance coverage by Grace agreeing to discount AIG's total coverage of $523.8 million by twenty percent (20%) to $419 million, and in turn, AIG agreeing to pay eleven percent (11%) of Grace's asbestos receivables at December 31, 1992, and twenty-two percent (22%) of Grace's allocated expense and indemnity payments on or after January 1, 1993, until the $419 million amount is exhausted. The essential terms of the settlement agreement are reflected in the April 23, 1993 Draft Settlement Agreement.

XXVI.

The AIG Third-Party Defendants are obligated to pay twenty two-percent (22%) of Grace's allocated expenses incurred in the underlying action and twenty-two percent (22%) of the indemnity payments Grace agreed to make in settlement of the underlying action. Because Illinois National Insurance Company is not a party, the maximum amount of AIG coverage available to Grace in this third-party action is $415 million.

SIGNED AND ENTERED this 14 day of Jan., 1995.

/s/

JUDGE, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, BEAUMONT DIVISION

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 94-40155

DAYTON INDEPENDENT SCHOOL DISTRICT, ET AL.,
Plaintiffs,
versus
U.S. MINERAL PRODUCTS COMPANY, ET AL.,
Defendants.

****

W.R. GRACE AND COMPANY-CONN.,
Defendant-Third Party
Plaintiff-Appellee,
and
DAYTON INDEPENDENT SCHOOL DISTRICT, ET AL.,
Intervenors-Appellees.
versus
ADMIRAL INSURANCE COMPANY, ET AL.,
Third Party Defendants,
and
AIU INSURANCE COMPANY, ET AL.,
Third Party Defendants,
Appellants.

Appeals from the United States District Court for the Eastern District of Texas

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 4-12-95, 5 Cir., _____, _____ F.3d _____)

(May 18, 1995)

Before REYNALDO G. GARZA and HIGGIBOTHAM [sic], Circuit Judges and FELDMAN*, District Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Judges who are in regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en bank, and a majority of the judges in active service not having voted in favor, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

*District Judge of the Eastern District of Louisiana, sitting by designation.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

DAYTON INDEPENDENT SCHOOL DISTRICT, ET AL.,	§	
Plaintiffs,	§	
and	§	
THE COUNTY OF ORANGE, ET AL.,	§	**Civil Action No. B-87-00507-CA FILED UNDER SEAL**
Intervenors	§	
v.	§	
U.S. MINERAL PRODUCTS COMPANY, ET AL.	§	
Defendants.	§	

W.R. GRACE & COMPANY

Defendant and
Third-Party Plaintiff,

and

DAYTON INDEPENDENT SCHOOL DISTRICT, ET AL.,

Intervenors

v.

ADMIRAL INSURANCE COMPANY, ET AL.,

Third-Party
Defendants.

[Filed March 21, 1994]

RULE 54(b) CERTIFICATION AND FINAL JUDGMENT

On 3/18/94, this Court entered its Interlocutory Judgment in this third-party action. In that Interlocutory Judgment, the Court granted the motion filed by Third-Party Plaintiff W.R. Grace & Co. - Conn. ("Grace"), and joined in by Intervenors, Dayton Independent School District, *et al.* ("Intervenors"), to enforce the settlement agreement entered into by Grace and Third-Party Defendants American Home Assurance Company, AIU Insurance Company, Birmingham Fire Insurance Company of Pennsylvania, Granite State Insurance Company, The Insurance Company of State of Pennsylvania, Lexington

Insurance Company, National Union Fire Insurance Company of Pittsburgh, Pa., and New Hampshire Insurance Company ("AIG Companies"). In that Interlocutory Judgment, the Court further ordered that the AIG Companies are obligated to pay Grace the amounts due from the AIG Companies under the settlement agreement and declared that Intervenors are entitled to recovery of a percentage of the $13,200,000 to be paid to Grace by the AIG Companies. Grace has since withdrawn its claim to recover unreimbursed allocated expenses as set forth in Paragraph 4 of the Interlocutory Judgment. Grace and Intervenors now move, under Federal Rule of Civil Procedure 54(b), for entry of final judgment with respect to the remaining portions of the Interlocutory Judgment.

The Court, after consideration of this motion, expressly determines that there is no just reason for delay of the entry of final judgment with respect to the settlement agreement and expressly directs that final judgment be entered for the following reasons:

1. This third-party action involves a coverage dispute between Grace and 47 of its excess insurance carriers. The dispute centers on the interpretation of the policies issued to Grace by those excess insurance carriers and also involves allegations of statutory and common law "bad faith" claims against those excess carriers. The settlement agreement between Grace and the AIG Companies supersedes the excess insurance policies issued to Grace by the AIG Companies. The motion to enforce, therefore, does not involve interpretation of the provisions of any of the AIG Companies' excess insurance policies or resolution of "bad faith" claims against the AIG Companies. Consequently, the judgment does not involve the same factual or legal basis as the remaining unadjudicated claims; the Court of Appeals will not have to consider the same claims in any potential future appeal arising from this third-party action. *See Road Sprinkler Fitters Local Union v. Continental*

Sprinkler Company, 967 F.2d 145, 151-52 (5th Cir. 1992) ("The final judgment rule and the propriety of certification under Rule 54(b) exist, in part, to ensure that a single set of factual and legal questions come before the Court of Appeals but once. . . .").

2. Because the judgment fully adjudicates all of the claims for relief asserted by Grace against the AIG Companies, Rule 54(b) certification at this time is proper. *Bader v. Atlantic International Ltd.*, 986 F.2d 912, 915 (5th Cir. 1993); *Jetco Electronics Industries, Inc. v. Gardiner*, 473 F.2d 1228, 1231 (5th Cir. 1973).

3. This third-party action has been pending since November 1991. On August 25, 1993, the United States Court of Appeals for the Fifth Circuit entered an order in the mandamus proceeding, *In re Plaisted and London Market Companies, et al.*, No. 93-4321 (5th Cir. Aug. 25, 1993). Pursuant to that order, this third-party action cannot go to trial until after the United States Court of Appeals for the Second Circuit issues its ruling in *Maryland Casualty Co. v. W.R. Grace & Co. - Conn., et al.*, No. 91-9322 (2d Cir.). Although the Second Circuit issued an opinion on September 1, 1993, it subsequently granted rehearing. The parties to that appeal are currently submitting further briefing; no oral argument date has yet been set. Final resolution of the Second Circuit appeal, and as a consequence, this third-party action is therefore far from imminent.

4. No interested party will be prejudiced by the entry of final judgment. The AIG Companies have already demonstrated their desire for immediate appellate review by filing a notice of appeal to the Fifth Circuit with respect to the enforcement claim on February 11, 1994. The AIG Companies' notice of appeal is, however, premature, because the order appealed from - the January 27, 1994 order enforcing the settlement agreement - is an interlocutory order and not a final judgment for purposes of appeal under

28 U.S.C. § 1291. *Bader,* 986 F.2d at 915. Grace, which has made substantial settlement payments to the Intervenors, and Intervenors, which are entitled to a percentage of Grace's recovery from the AIG Companies, are entitled to the immediate benefit of the recovery that has been awarded. Delaying entry of final judgment until the third-party action is finally resolved would be unfair to Grace and the Intervenors, especially in light of the circumstances described in Paragraph 3 above.

Accordingly, it is

ORDERED that the joint motion for entry of final judgment and Rule 54(b) certification is GRANTED; and it is further

ORDERED that Grace have judgment against the AIG Companies in the amount of $8,800,000 which is 22% of the $40,000,000 payment made by Grace to Intervenors on January 5, 1993; and it is further

ORDERED that Grace have judgment against the AIG Companies in the amount of $4,400,000 which is 22% of the $20,000,000 payment made by Grace to Intervenors on January 5, 1994; and it is further

ORDERED that Intervenors have judgment declaring that upon payment to Grace of $13,200,000, Grace shall pay Intervenors 10.1986 percent of such payment in partial satisfaction of the $25,000,000 claim assigned by Grace to Intervenors to the extent that the assigned claim has not been satisfied by other payments made by Grace.

The Court herein retains jurisdiction to determine the amount of attorney's fees, if any, to be awarded Grace for the services of its attorneys in connection with enforcing the settlement agreement entered in by Grace and the AIG Companies.

Signed this 18 day of March, 1994.

/s/

UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
SEP 14 1995
CLERK

No. 95-260

IN THE

Supreme Court of the United States

OCTOBER TERM 1995

AIU INSURANCE CO., ET AL.,

Petitioners,

v.

W. R. GRACE AND COMPANY - CONN., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Dated: September 14, 1995

20 pp

QUESTION PRESENTED

Whether there is a conflict among the circuits concerning application of the clearly erroneous standard of review to a district court's resolution of the inherently factual question of whether the parties intended to form a binding agreement.

RULE 29.1 STATEMENT

Respondent W. R. Grace and Company – Conn. ("Grace") is a corporation organized under the laws of Connecticut and is a wholly-owned subsidiary of W. R. Grace & Co. Grace's subsidiaries or partnerships, other than wholly-owned operations, are: A-O Grace Kaustik, A-O Grace Kriz, Boodin Partnership, Carbon Dioxide Slurry Systems LP, Cormix Middle East LLC, Dearborn I.E.I. (India) Private Ltd., Emirates Chemicals LLC, Grace Cocoa Associates, L.P., Grace Offshore Turnkey, Grace Ventures Partnership II, Guangzhou Nanfang NMC Hemodialysis Center Company Limited, HIC Pharmacy Services, L.P., Healthtech Medical, Immunecare of Hollywood, Immunecare of Key West, Infusion Systems, Metreon, New Bedford Infusioncare, Nippon Dearborn Kabushiki Kaisha, North Suburban Dialysis, OB One & IVtoo, Palm Springs I.V. Care II, Parade & Omicron Sdn. Bhd., Paramount Coal Company, Pharmacy Direct, Primecare Home Health Services, Pursue Gas Processing and Petrochemical Company, Quality Home Care Services of Watertown, NY, Sleep Diagnostic Associates, Sisters of Charity Home Health Care, VNA-NMC Homecare Partnership, Renal Services (Malaysia) Sdn. Bhd., and Riggers Dialysatoren Produktion Thalheim GmbH & Co. K.G.

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IN THE

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OCTOBER TERM 1995

No. 95-260

AIU INSURANCE CO., ET AL.,

Petitioners,

v.

W. R. GRACE AND COMPANY - CONN., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Various respondent school districts and public entities in the State of Texas (collectively, "Dayton ISD") brought suit against respondent W. R. Grace and Company - Conn. ("Grace") for the cost of removing from their buildings asbestos-containing products manufactured by Grace. Grace filed a third-party action against certain of its excess insurance carriers (including petitioners) to recover defense costs and indemnity for the claims asserted by Dayton ISD. Grace and Dayton ISD eventually settled the main case. As part of the settlement, Grace assigned to Dayton ISD a percentage of any recovery it obtained in the third-party action against its insurers. Dayton ISD then intervened in the third-party action against petitioners and Grace's other excess insurers.

Grace and petitioners entered into settlement discussions beginning in the spring of 1992. In November, the parties reached an agreement in principle whereby petitioners agreed to pay on an on-going basis specified percentages of Grace's asbestos-related liabilities (including defense costs, settlements and judgments). Grace, in turn, agreed to discount by 20% the total insurance coverage provided by petitioners, thereby capping petitioners' total exposure at approximately $420 million. Between November 1992 and April 1993, the parties finalized the terms of their settlement and exchanged draft agreements reflecting those terms. Grace and petitioners reached final agreement on all essential terms of their settlement by late April, and those terms were reflected in a settlement agreement circulated on April 23, 1993.

On June 11, 1993, petitioners made a payment to Grace of $15.3 million "pursuant to" and in compliance with the terms of the settlement. Although the settlement agreement had not yet been executed, petitioners assured Grace that the agreement was being circulated, that some signatures had been obtained, and that the remaining signatures would be obtained shortly. On August 30, petitioners made a second payment to Grace of $15.3 million — again, "pursuant to" and in compliance with the terms of the agreement. Throughout the summer and early fall of 1993, petitioners repeatedly reassured Grace that there were no open terms or outstanding disagreements and that a fully signed settlement agreement would be forthcoming shortly. Petitioners also assured Grace that the next payment due under the settlement would be made, as required, in October.

On September 1, 1993, the Second Circuit issued its opinion in *Maryland Casualty Co. v. W. R. Grace & Co.*, 23 F.3d 617 (2d Cir. 1993), *cert. denied*, 115 S. Ct. 655 (1994). That decision would have — but for the settlement — effectively reduced petitioners' potential exposure for Grace's asbestos-related liabilities from amounts exceeding $500 million to approximately $60 million. On October 7, 1993, petitioners, citing only the Second Circuit's opinion in *Maryland Casualty*, repudiated their settlement with Grace. They did so notwithstanding that, when the settlement was being negotiated, both sides were aware of and

obviously accepted the uncertainties and risks created by the pendency of the *Maryland Casualty* case in the Second Circuit.

Grace then moved the district court to enforce the settlement agreement. The district court conducted an evidentiary hearing on the motion on November 2 and 3, 1993, and then entered findings of fact and conclusions of law. The district court found, as a matter of fact, that the parties had reached an agreement concerning all of the essential terms of the settlement, that significant partial performance had occurred, and that the parties had not expressly reserved the right to be bound only by a written agreement. Although recognizing that agreements such as the one at issue are ordinarily in writing, the district court also found, again as a matter of fact, that the parties intended to be bound to their settlement even though the written settlement agreement had not yet been executed. The district court entered judgment enforcing petitioners' obligations under the settlement agreement with respect to the claims of Dayton ISD.

Petitioners appealed the district court's judgment to the United States Court of Appeals for the Fifth Circuit. The court of appeals correctly concluded that the central issue was whether the parties intended to be bound by their settlement agreement before formal execution of a written instrument. Appendix, *infra,* at 3a. The court held that, while the intent of the parties presented a close question of fact, the district court's resolution of the question was not clearly erroneous. The Fifth Circuit therefore affirmed the judgment of the district court.

REASONS FOR DENYING THE WRIT

The court of appeals properly applied the clearly erroneous standard of review to the district court's determination of the parties' intent to be bound prior to formal execution of a written agreement. In this context, the intent of the parties has always been recognized as a question of fact. No conflict exists among the circuits concerning the standard of review applicable to such questions. Any conflict that may exist among the circuits concerning the appropriate standard for reviewing mixed questions of law and fact is irrelevant because fact questions were dispositive

of this case and because petitioners' appeal did not require the Fifth Circuit to review the resolution of any mixed questions. In any event, the Fifth Circuit has adopted the standard of review for mixed questions that is most favorable to petitioners; had any such questions been presented, Fifth Circuit precedent would have mandated de novo review.

A. The Court of Appeals Reviewed a Finding of Intent of the Parties to a Contract for Clear Error and did not Address whether Other Issues of Contract Formation are Subject to Clear-Error Review.

Petitioners maintain that certiorari should be granted to resolve a conflict among the circuits concerning application of clear-error or de novo review to the question of whether a contract has been formed. However, that issue does not exist in this case. Rather, the court of appeals' opinion turns entirely on the specific fact question of whether the parties intended to be bound by their settlement before a written agreement was executed. In evaluating this question, the court of appeals looked first to the provisions of the written agreement that had been circulated. The court found that those provisions were not

> conclusive on the question of whether the parties earlier had reached a binding oral agreement. Rather, they are signals of the parties' intent, albeit strong signals. That is, these provisions are relevant to the question of whether the parties intended to be bound before formal execution of the written instrument. This ultimately is a fact question, and our inquiry is whether the district court was clearly erroneous in its finding.

Appendix, *infra,* at 3a. The court of appeals then applied the deferential clearly erroneous standard to the district court's fact-findings, and concluded that clear error had not occurred. The court of appeals' determination was based upon "one powerful set of circumstances — the partial performance of the contract." *Id.* The court of appeals concluded that the facts demonstrated the existence of "an agreement partially performed by payments in excess of $30 million where nothing else remained to be done in negotiations beyond the signature." Under such circumstances,

the court of appeals concluded that the district court's finding that the parties intended to be bound by the terms of their settlement before a written agreement was formally executed was not clearly erroneous.

Petitioners' assertion that the court of appeals applied clear-error review to the determination "that the parties had formed a binding and enforceable settlement agreement," Petition at 9, mischaracterizes the court of appeals' opinion. The court of appeals did not hold — or even mention — that issues of contract formation are subject to clear-error review. Rather, the court of appeals simply reviewed the fact finding that "the parties intended to be bound" for clear error. Thus, the issue described in the petition for certiorari is simply not presented.

B. The Court of Appeals' Holding is Consistent with Decisions of this Court and other Circuit Courts.

This Court has repeatedly held that the question of intent is an issue for the trier of fact and is subject to the clearly erroneous rule.[1] The circuits are in agreement that the intent of parties to be bound to a contract is a factual finding subject to the clearly erroneous standard of review.[2] The court of appeals correctly employed this standard, and there is no conflict between this holding and the holdings of other circuit courts of appeals.

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[1] *See, e.g., Pullman-Standard v. Swint,* 456 U.S. 273, 288 (1982); *Commissioner v. Duberstein,* 363 U.S. 278 (1960); *United States v. Yellow Cab Co.,* 338 U.S. 338, 341 (1949).

[2] *See, e.g., Paine Webber, Inc. v. Hartmann,* 921 F.2d 507 (3d Cir. 1990); *Stock Equipment Co., a Unit of General Signal Corp. v. Tennessee Valley Authority,* 906 F.2d 583 (11th Cir. 1990); *National Union Fire Insurance Co. v. Circle, Inc.* 915 F.2d 986 (5th Cir. 1990); *RCI Northeast Services Div. v. Boston Edison Co.,* 822 F.2d 199 (1st Cir. 1987); *Ginsu Products, Inc. v. Dart Industries, Inc.,*786 F.2d 260 (7th Cir. 1986); *Marine Transport Lines, Inc. v. International Organization of Masters, Mates, and Pilots,* 878 F.2d 41 (2d Cir.), *cert. denied,* 474 U.S. 825 (1985).

C. No Conflict Exists Among the Circuit Courts Concerning the Appropriate Standard of Review to Apply to Generalized Questions Involving Contract Formation.

Even if this case presented the issue of the proper standard of review applicable to general questions of contract formation, it would not implicate any conflict among the holdings of the courts of appeals of the various circuits. Those courts have applied differing standards of review to issues that concern contract formation depending upon the basis for the district court's particular finding. If the issue only requires interpretation of the language in a contract, that is a question of law, subject to de novo review. If, on the other had, the question turns on the consideration of extrinsic evidence, then the district court's finding will be one of fact, reviewable only for clear error.[3] The applicable standard of review turns, as it should, on the underlying character of the district court's determination. Here, the district court's determination concerned the intent of the parties to be bound prior to execution of a written agreement — a determination that was appropriately subjected to the clearly erroneous standard of review.[4]

The cases cited by petitioners do not reveal a conflict among the circuits. Rather, they simply reflect application of different standards of review depending on the character of the underlying finding.[5] Moreover, even if those cases are read to reveal a split of

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[3] *Forest Oil Corp. v. Strata Energy, Inc.*, 929 F.2d 1039 (5th Cir. 1991); *National Union*, 915 F.2d at 989; *L. K. Cornstock & Co., Inc. v. United Engineers & Constructors, Inc.*, 880 F.2d 219 (9th Cir. 1989); *Amerdyne Industries, Inc. v. POM Inc.*, 760 F.2d 875 (8th Cir. 1985).

[4] *National Union*, 915 F.2d at 989.

[5] *Bina v. Providence College*, 39 F.3d 21, 27 (1st Cir. 1994) (whether a contract is formed is a question of fact as long as the evidence is capable of supporting conflicting inferences); *A-Transport Northwest Co. v. United States*, 36 F.3d 1576, 1580-81 (Fed. Cir. 1994) (whether the language of a written document constituted a binding contract or a continuing offer is a question of law); *Daly Const., Inc. v. Garrett*, 5 F.3d 520, 521 (Fed. Cir. 1993) (whether the modification of a government contract is effective without issuance of a formal contract

authority among the circuit courts of appeals, such a split is not implicated by the court of appeals' opinion in the instant case. The Fifth Circuit applied the clearly erroneous standard of review to the district court's determination of the parties' intent to be bound, and not to the district court's finding of a valid enforceable contract.

D. Any Conflict Concerning the Standard of Review Applicable to Mixed Questions of Law and Fact is not Implicated.

The intent of the parties was the core question presented on appeal to the Fifth Circuit. That is a pure question of fact, not a mixed question of law and fact, and it is the only determination to which the Fifth Circuit applied clear-error review. There is no reference in the court of appeals' opinion to any mixed questions of law and fact or to the standard of review applicable to such questions. The issue of the proper standard of review to apply to mixed questions of law and fact is thus not presented in this case.

The Fifth Circuit has resolved the issue of the standard applied to mixed questions in favor of petitioners' position. That is, the Fifth Circuit reviews mixed questions of law and fact de novo.[6] Thus, to the extent the Fifth Circuit resolved any mixed questions in affirming the judgment of the district court, it can be presumed

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modification is a question of law); *Devlin v. Ingram*, 928 F.2d 1084, 1089-90 (11th Cir. 1991) (proper standard to apply to undisputed facts is a question of law); *In re NWFX, Inc.*, 864 F.2d 588 (8th Cir. 1988) (applying a deferential standard to the lower court's underlying fact findings and reviewing de novo the question of whether a contract was formed); *Augusta Aviation v. United States*, 671 F.2d 445, 447 (11th Cir. 1982) (conclusions drawn from subsidiary facts are reviewed de novo); *Boudreaux v. ABC Insurance Co.*, 689 F.2d 1256, 1260 (5th Cir. 1982) (whether a car lease clause demonstrated the existence of an insurance contract was question of fact); *Three-Seventy Leasing Corp. v. Ampex Corp.*, 528 F.2d 993 (5th Cir. 1976) (whether agent had authority to enter a binding contract was question of fact).

[6] *Radio WHKW, Inc. v. Yarber*, 838 F.2d 1439, 1442 (5th Cir. 1988); *Amoco Transport Co. v. S/S Mason Lykes*, 768 F.2d 659, 663 (5th Cir. 1985); *Robicheaux v. Radcliff Material, Inc.*, 697 F.2d 662, 666 (5th Cir. 1983).

that the court followed established Fifth Circuit precedent and applied de novo review. The fact that the court's per curiam, unpublished opinion does not expressly state that de novo review was applied to any mixed questions cannot support petitioners' speculation that only a clear-error analysis was performed.

E. No Special or Important Question is Presented.

This diversity case largely involves state law issues of contract interpretation. The issues described by petitioners are not presented and could not properly be resolved on the facts of this case. Interestingly, in their petition to this Court, petitioners themselves concede that the case is largely based on questions of state law: "The central issue here was whether the purported settlement agreement complied with the specific requirements of New York law governing enforceability of agreements between litigants." Petition at 20. The court of appeals resolved this issue by reviewing the district court's factual finding that the parties to the settlement agreement intended to be bound by that agreement before it was executed. This holding is relevant only to the specific questions presented in this case, as reflected by the court of appeals' decision not to publish its opinion.[7] No reasons of the character set forth in Supreme Court Rule 10.1(a) for granting the petition for writ of certiorari are present.

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[7] Fifth Circuit Local Rule 47.5 addresses the publication of opinions of the court and provides that opinions that have no precedential value and that decide cases on the basis of well-settled principles of law should not be published.

CONCLUSION

The Fifth Circuit Court of Appeals' opinion correctly resolved the questions presented, it is not in conflict with any other Circuit Court of Appeals, and it does not meet any of the other criteria for certiorari review by this Court. Accordingly, the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Dated: September 14, 1995.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 94-40155

DAYTON INDEPENDENT SCHOOL DISTRICT, ET AL.,
Plaintiffs,

VERSUS

U.S. MINERAL PRODUCTS CO., ET AL.,
Defendants.

W. R. GRACE AND COMPANY - CONN.,
Defendant-Third Party Plaintiff-Appellee,

AND

DAYTON INDEPENDENT SCHOOL DISTRICT, ET AL.,
Intervenors-Appellees,

VERSUS

ADMIRAL INSURANCE CO., ET AL.,
Third Party Defendants,

AND

AIG INSURANCE CO., ET AL.,
Third Party Defendants, Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

(1:87-CV-00507-B)

APPENDIX

Before REYNALDO G. GARZA and HIGGINBOTHAM, Circuit Judges, and FELDMAN*, District Judge.

PER CURIAM:**

The background facts of this case are complex, but the issues now brought to us are straightforward. With the benefit of briefs and excellent oral argument, we affirm for essentially the reasons stated by the district court.

We have little difficulty with the jurisdiction of the trial court. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 114 S.Ct. 1673, 1677 (1994), is not apposite. The district court had diversity jurisdiction over the third party action and the authority to enforce a settlement of that case. It is no answer that the settlement of the case before Judge Fisher did more than resolve the case pending before him. There has been no showing that the absence of Illinois National Bank was fatal to the district court's power to enforce an agreement. In short, the district court had jurisdiction, and we see no impediment to its power to enter a settlement agreement. The issue is whether there was an enforceable agreement.

The district court found that the parties had reached a binding agreement to settle the case, and that nothing remained to be done beyond the signatures on the written instrument. This finding engages paragraphs of the unexecuted written instrument, including 6.4, which recites: This "Agreement shall become effective" after the last party executes it. Other provisions of the written instrument contemplate a written document. The parties unquestionably all intended that the Settlement Agreement find

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* District Judge of the Eastern District of Louisiana, sitting by designation.

** Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

expression in a formal instrument and, of course, that did not occur.

We are not persuaded, however, that the various provisions of the written document are conclusive on the question of whether the parties earlier had reached a binding oral agreement. Rather, they are signals of the parties' intent, albeit strong signals. That is, those provisions are relevant to the question of whether the parties intended to be bound before formal execution of the written instrument. This ultimately is a fact question, and our inquiry is whether the district court was clearly erroneous in its finding. We could not sustain the district court's finding but for one powerful set of circumstances — the partial performance of the contract itself. The unexecuted written instrument contemplated substantial installment payments beginning in the summer of 1993. AIG made the first two installment payments totalling $30.6 million to Grace "pursuant to the agreement in principle" and was preparing to make the third of $15.7 million in October when on September 1, 1993, the Second Circuit decided the *Maryland Casualty* case. *See Maryland Casualty Co. v. W. R. Grace & Co.*, 23 F.3d 617 (2d Cir. 1993). This settlement was negotiated in the shadow of the *Maryland Casualty* appeal, and that decision reduced AIG's maximum exposure under the excess policies from $523 million to $65 million.

We find the question of whether the district court's finding of the parties' intent was clearly erroneous to be close. We think the district court could conclude that these payments were partial performance of the agreement between the parties. The payments resist description as small good faith payments intended to keep the prospects of settlement alive. They were in the amount and paid at the times called for under the agrement yet to be finally signed. Adding this partial performance evidence to the mix created a fact issue regarding the parties' intent, an issue for the district court. We are not persuaded that it is clearly erroneous.

Counsel earnestly calls attention to the consequences of finding a contract from negotiating efforts of parties when their efforts have not found final expression in an executed instrument. We

think those risks are allocated by the contract law of New York. These dire consequences are not posed on these unique facts. We have an agreement partially performed by payments in excess of $30 million where nothing else remained to be done in negotiations beyond the signature. While not a large percentage of the settlement sum, they remain large in absolute measure and sum to payments nearly half of AIG's total exposure after the *Maryland Casualty* case. The uncertainties in the *Maryland Casualty* case were presumably reflected in the settlement terms. A trier of fact could conclude that if the parties did not intend that the agreement to be signed was enforceable in the summer of 1993, the settlement amounts, allocating as they did the risk of an adverse appellate decision, makes little sense. There are doubtless many explanations for these events and we do not mean to seize on one over others, or to suggest that there are not also inferences supporting the contentions of AIG. As we explained, this presents a close issue of fact. The findings of the district court were not clearly erroneous.

AFFIRMED.

Supreme Court, U.S.
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No. 95-260

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

AIU INSURANCE CO., *et al.*,

Petitioners,

v.

W. R. GRACE AND COMPANY-CONN., *et al.*,

Respondents.

On Petition for a Writer of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONERS

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5 pp

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

Petitioners AIU Insurance Co. *et al.* respectfully submit this reply brief in support of their petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

1. Grace makes no effort to refute petitioners' showing (Pet. 10) that the Fifth Circuit consistently reviews contract formation questions only for clear error. *See, e.g.*, *Boudreaux v. ABC Insurance Co.*, 689 F.2d 1256, 1260 (5th Cir. 1982) ("[w]e must assume the existence of a[] . . . contract . . . unless the district court's finding to that effect was clearly erroneous"); *Three-Seventy Leasing Corp. v. Ampex Corp.*, 528 F.2d 993, 997 (5th Cir. 1976) ("The district court's finding that a contract was formed is

. . . not clearly erroneous.").[1] Instead, Grace argues (Br. in Opp. 3-5, 7-8) that review is not warranted in this case because the court of appeals applied the clear-error standard only to the factual issue of the parties' intent.

Contrary to Grace's contention, however, the issues before the court of appeals were not limited to the question of the parties' intent. Instead, as the court of appeals itself recognized, "[t]he issue is whether there was an enforceable agreement." As explained in the petition (Pet. 7, 20) without contradiction from Grace, resolution of that issue required the court to construe New York contract law--including statutes precluding enforcement of unsigned settlement agreements--and to apply that law to the facts. Application of law to fact is, by definition, a mixed question of fact and law, yet the court of appeals made absolutely clear that it reviewed the district court's decision only for clear error: "[T]his presents a close issue of fact. The findings of the district court were not clearly erroneous." Pet. App. 5a. The only possible conclusion to be drawn from the court of appeals' opinion is that, in keeping with binding Fifth Circuit precedent, the court reviewed the ultimate question of contract formation only for clear error. Accordingly, this case squarely presents the question of the appropriate standard of review, and Grace's contentions to the contrary are without merit.

2. Grace also errs in denying (Br. in Opp. 6-7) that the circuits are divided over the question presented by this

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[1] Grace does contend that "the Fifth Circuit reviews mixed questions of law and fact de novo." Br. in Opp. 7. The cases cited by Grace for this proposition, however, do not involve contract formation issues, and are therefore inapposite. *See, e.g., Radio WHKW, Inc. v. Yarber*, 838 F.2d 1439, 1442 (5th Cir. 1988) (reviewing question whether corporation had "localized" its business activities in a particular State); *Amoco Transport Co. v. S/S Mason Lykes*, 768 F.2d 659, 663 (5th Cir. 1985) (reviewing question whether ocean carrier's decision to abandon a voyage was reasonable); *Robicheaux v. Radcliff Material, Inc.*, 697 F.2d 662, 666 (5th Cir. 1983) (reviewing question whether individuals were employees or independent contractors).

petition. According to Grace, where "the question [of contract formation] turns on the consideration of extrinsic evidence, then the district court's finding will be one of fact, reviewable only for clear error." Br. in Opp. 6. Grace's characterization is certainly consistent with the law of the Fifth Circuit, but it is squarely contrary to the approach followed by other circuits. Indeed, the Eleventh Circuit addressed itself to precisely this situation and reached precisely the opposite conclusion: "In drawing conclusions from subsidiary facts the ability of the trial court to apply the law properly becomes more significant than its peculiar advantage in judging the weight of the evidence. Thus, it is logical for the reviewing court to treat ultimate facts as matters of law that it may determine independently." *Augusta Aviation, Inc. v. United States*, 671 F.2d 445, 447 (11th Cir. 1982). The *Augusta Aviation* court accordingly applied de novo review to the question whether the extrinsic evidence, including "the amount of money promised and paid" and "the sequence of events," demonstrated the existence of a binding contract. *Id.* at 448.

Likewise, in *Daly Const., Inc. v. Garrett*, 5 F.3d 520 (Fed. Cir. 1993), the court applied de novo review in determining whether a series of negotiations between the parties gave rise to a binding contract. The court explained that "[w]hether there was a binding agreement flowing from this negotiation is a question of law." *Id.* at 521. *Accord A-Transport Northwest Co. v. United States*, 36 F.3d 1576, 1580-81 (Fed. Cir. 1994) (holding that the question whether a document "constituted a binding contract between the parties" is "a question of law," and concluding that "*[o]n the facts of this case*" a contract has been formed) (emphasis added).

Thus, it is clear that some courts of appeals--unlike the court below--will apply de novo review in answering the ultimate question whether, given the particular facts of each case, a contract has been formed. Other courts, including the First and Fifth Circuits, follow the rule advocated by Grace. Review is warranted to resolve this widening conflict.

3. Finally, Grace also errs in asserting (Br. in Opp. 8) that this case does not warrant review because it "largely

involves state law issues of contract interpretation." The question raised in the petition is one of federal, not state, law, and it arises with great frequency in contract cases and, more generally, in a wide variety of cases involving mixed questions of law and fact. Indeed, Grace does not and cannot dispute the existence of a wide circuit split over the general approach to be taken to determining the standard of review for mixed questions. As noted in the petition (Pet. 19), this Court has frequently granted certiorari to resolve similar questions of the appropriate standard of review to be applied to particular issues, and the same result is appropriate here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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